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THE  
PRINCIPLES OF EQUITY,

INTENDED FOR  
THE USE OF STUDENTS AND THE  
PROFESSION.

BY  
EDMUND H. T. SNELL,  
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

*Sixth Edition.*

TO WHICH IS ADDED  
AN EPITOME OF THE EQUITY PRACTICE.

*Third Edition.*

BY  
ARCHIBALD BROWN,  
M.A. EDIN. & OXON., AND B.C.L. OXON.  
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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1882.

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TO  
WILLIAM LLOYD BIRKBECK,  
DOWNING PROFESSOR OF THE LAWS OF ENGLAND  
IN THE UNIVERSITY OF CAMBRIDGE,  
AND FORMERLY  
READER IN EQUITY TO THE INNS OF COURT,  
THIS SIXTH EDITION  
OF  
“ Snell’s Equity,”  
TOGETHER WITH THIS THIRD EDITION  
OF THE  
“ Practice in Equity,”  
CONTINUES TO BE  
RESPECTFULLY INSCRIBED,—  
BY THE EDITOR,  
WHO (LIKE THE AUTHOR) WAS  
FORMERLY HIS MUCH ADMIRING PUPIL.



## PREFACE TO THE FIRST EDITION.

---

THE Author, in the course of his studies for the Bar, made so many notes on the Principles of Equity and the cases in support of them, not only from his own private reading, but from the Lectures of that able and distinguished master, Mr. Birkbeck, the Lecturer on Equity Jurisprudence, that it required but little trouble to recast and mould them into the form of a book. Venturing to think that the work may prove useful not only to the student but to the practitioner, he ventures with diffidence to submit the result of his labours to the consideration of the profession.

5 ESSEX COURT, TEMPLE,  
*January 1868.*





## PREFACE TO THE FOURTH EDITION

(*ABRIDGED*).



THE Author of the "Principles of Equity" being dead, and the Editor of the Second and Third Editions having also died, and a new edition being wanted, I have, at the Publishers' request, edited the Fourth Edition.

To the "Principles of Equity" I have added the "Practice in Equity."

ARCHIBALD BROWN.

*May 1877.*



## PREFACE TO THE SIXTH EDITION.

---

IN this Sixth Edition, the “Principles of Equity” have been thoroughly revised; various new matters (*e.g.*, the executor’s retainer, the effect of sect. 10 of the Judicature Act, 1875, &c.) have been fully stated and expounded; the new legislation (notably that regarding mortgages and married women) has been both summarised, and also worked into the text wherever that text required to be modified thereby; and all the new decisions have likewise been incorporated and noted up in their proper places. By various devices, room has been found for this very considerable body of new matter without increasing the bulk of this edition; and in particular, by the condensation into sections of the Auxiliary Jurisdiction (now obsolete), which was formerly discussed in separate chapters.

The “Practice in Equity” has also, in this Third Edition thereof, been carefully revised; and every new decision up to November 1882

inclusive in the Law Reports, and some few decisions in the other Reports, bearing upon the practice, together with the latest new Orders and Rules, have been incorporated in their proper places.

And it is hoped that both the Principles and the Epitome of the Practice will prove of continuing service not only to the Student preparing for his examination, but also (although necessarily in a less degree) to the Practising Lawyer in either branch of the Profession.

A. BROWN.

8 NEW SQUARE, LINCOLN'S INN, W.C.,  
*November 1882.*

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# REPORTS AND TEXT WRITERS,

WITH

## ABBREVIATIONS.



Ad. and Ell.	Adolphus and Ellis.
Amb.	Ambler.
Anst.	Anstruther.
Atk.	Atkyns.
Ball & B.	Ball and Beatty (Irish).
B. & A.	Barnewall and Alderson.
B. & Ad.	Barnewall and Adolphus.
Barn & Cross.	Barnewall and Crosswell.
Beav.	Beavan.
B. & S.	Best and Smith.
Bing N. C.	Bingham, New Cases.
Bl. Com.	Blackstone's Commentaries.
B. & P.	Bosanquet and Puller.
Brod. and Bing.	Broderip and Bingham.
Bro. C. C.	Brown's Chancery Cases.
Bro. Law Dict.	Brown's Law Dictionary and Institute.
Bro. P. C.	Brown's Parliamentary Cases.
Ca. t. Talb.	Cases <i>tempore</i> Talbot.
Cha. Ca.	Cases in Chancery.
Co. Lit.	Coke upon Littleton.
Coop.	Cooper (G.), Chancery Cases.
Coote.	Coote on Mortgages.
Cowp.	Cowper.
Cr. & Ph.	Craig and Phillips.
Cro. Eliz.	Croke's Reports, vol. i.
Dan. Ch. Pr.	Daniell's Chancery Practice, 5th ed.
Dart's V. & P.	Dart's Vendors and Purchasers, 4th ed.
De G. F. & Jo.	De Gex, Fisher, and Jones.
De G. & J.	De Gex and Jones.
De G. J. & S.	De Gex, Jones, and Smith.
De G. M. & G.	De Gex, Macnaghten, and Gordon.
Dixon on Partn.	Dixon on Partnership.
Doug.	Douglas.
Drew.	Dewry.

# XX REPORTS AND TEXT WRITERS, WITH ABBREVIATIONS.

Dr. & Walsh.	Drury and Walsh.
Dr. & War.	Drury and Warren.
Eden.	Eden's Chancery Cases.
Ell. Bl. & Ell.	Ellis, Blackburn, and Ellis.
Ell. & Black.	Ellis and Blackburn.
E. & A.	Error and Appeal (Upper Canadian).
Exch. Rep.	Exchequer Reports.
Fonbl.	Fonblanque on Equity.
Fry on Spec. Perf.	Fry on Specific Performance.
Giff.	Giffard.
Gilb. Us.	Gilbert on Uses.
Gr.	Grant (Upper Canadian).
Ha.	Hare.
Hayes' Intro.	Hayes' Introduction to Conveyancing.
H. & Tw.	Hall and Twells.
H. & M.	Hemming and Miller.
Holt, N. P.	Holt, Nisi Prius Cases.
H. L. Cas.	House of Lords Cases.
John.	Johnson.
J. & H.	Johnson and Hemming.
J. & L.	Jones and Latouche (Irish).
Jac.	Jacob.
J. & W.	Jacob and Walker.
Jur. N. S.	Jurist, New Series.
K. & J.	Kay and Johnson.
Kay.	Kay.
Kee.	Keen.
L. J., N. S.	Law Journal, New Series.
L. R., Ch. App.	Law Reports, Chancery Appeal Cases.
L. R., Eq.	Law Reports, Equity Cases.
L. R., H. L.	Law Reports, House of Lords Cases.
L. R., P. C.	Law Reports, Privy Council Cases.
L. R., Ch. D.	Law Reports, Chancery Division (comprising Equity Cases and Chancery Appeal Cases since November 1875).
L. R., App. Ca.	Law Reports, Appellate Cases (comprising House of Lords and Privy Council Cases since November 1875).
L. R., Exch. Div.	} Law Reports, the respective Common Law Divisions, commencing November 1875).
L. R., C. P. Div.	
L. R., Q. B. Div.	
Lew. on Tr.	Lewin on Trusts.
L. C.	White and Tudor's Leading Cases in Equity, 5th ed.
Lind. Part.	Lindley on Partnership, 3d ed.
L. T. N. S.	Law Times Reports, New Series.
M. & G.	Macnaghten and Gordon.
Mad. & G.	Maddock and Geldart.
Madd.	Maddock.
Mayne on Dam.	Mayne on Damages.
Mod.	Modern Reports.
Moll.	Molloy (Irish).
Mont. D. & D.	Montague, Deacon, and De Gex.

Moore P. C. C.	Moore's Privy Council Cases.
My. & Cr.	Mylne and Craig.
My. & K.	Mylne and Keen.
Nev. & Man.	Neville and Manning.
Peach. Mar. Settl.	Peachy on Marriage Settlements.
P. Wms.	Peere Williams.
Ph.	Phillips.
Preced. Ch.	Precedents in Chancery.
Rep.	Lord Coke's Reports.
Rob.	Robertson's Ecclesiastical Reports.
Roper, Husb. & Wife.	Roper's Husband and Wife.
Russ.	Russell.
Russ. & My.	Russell and Mylne.
Sand. Us.	Sanders on Uses.
Sch. & Lef.	Schoales and Lefroy (Irish).
Sel. C. C.	Select Chancery Cases.
Show.	Shower.
Sim.	Simons.
Sm. & Giff.	Smale and Giffard.
Sm. Man.	Smith's Manual of Equity, 11th ed.
Sp.	Spence's Equity.
St.	Story's Equity Jurisprudence.
Sugd. V. & P.	Sugden's Vendors and Purchasers, 14th ed.
Sw. & Tr.	Swabey and Tristram.
Swanst.	Swanston.
T. R.	Term Reports.
T. & R.	Turner and Russell.
Vern.	Vernon.
Ves. & B.	Vesey and Beames.
Ves. Sr.	Vesey, Senior.
Ves. Jr.	Vesey, Junior.
W. R.	Weekly Reporter.
Wms. on Assets.	Williams on Real Assets.
Wms. on Exors.	Williams on Executors, 6th ed.
Wilm.	Wilmot's Notes and Opinions, K. B.
Y. & C. Exch. Ca.	Younge and Collyer's Exchequer Cases.
Yo. & Co. C. C.	Younge and Collyer's Chancery Cases.
Y. & J.	Younge and Jervis.



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- P. 72, n. (j)—Add *Paul v. Paul*, 20 Ch. Div. 742.
- P. 133, n. (a)—Add *In re Aldred's Estate*, 21 Ch. Div. 228.
- P. 145, n. (b)—Add *In re Alexandra Palace Co.*, 21 Ch. Div. 149.
- P. 256, n. (l)—Add *Van Gheluive v. Nerinsky*, 21 Ch. Div. 189.
- P. 267, n. (e)—Refer to *Broadbent v. Barrow*, 20 Ch. Div. 676.
- P. 314, n. (c)—Add *Woolley v. Colman*, 21 Ch. Div. 169.
- P. 322, n. (r)—Add *Clarke v. Palmer*, 21 Ch. Div. 124; following *Perry-Herrick v. Attwood*, 25 Beav. 305.
- P. 529, n. (o)—Add—And consider *Williams v. Walker*, 9 Q. B. Div. 576.
- P. 547, n. (n)—Add *In re Hall Dare's Contract*, 21 Ch. Div. 41.
- P. 548, n. (p)—Add *Walsh v. Lonsdale*, 21 Ch. Div. 9.
- P. 560, n. (f)—Add *In re Higgins & Hitchman's Contract*, 21 Ch. Div. 95; *Earl of Zetland v. Hislop*, 7 App. Cases, 427.
- P. 561, n. (i)—Add *Wolfe v. Matthews*, 21 Ch. Div. 194.
- P. 563, n. (n)—Add—And consider *Scarfe v. Jardine*, 7 App. Ca. 345.
- P. 579, n. (o)—Add *In re J. B. Palmer's Application*, 21 Ch. Div. 47; and *In re Braby's Application*, 21 Ch. Div. 223.
- P. 623, § 10—Refer to *Hunt v. Austin*, 9 Q. B. Div. 598 (a case of substituted service of a summons, as opposed to a writ of summons).
- P. 632, n. (u)—Add *Hilliard v. Hanson*, 21 Ch. Div. 69.
- P. 643, n. (p)—Add *Piller v. Roberts*, 21 Ch. Div. 198.
- P. 645, n. (x)—As to revivor in case of counter-claim, see *Andrew v. Aitken*, 21 Ch. Div. 175.
- P. 655, n. (a)—Add—A counterclaim may be excluded upon the ground that it combines a claim for the recovery of land with some other claim, without leave. See *Compton v. Preston*, 21 Ch. Div. 138.

- P. 740, n. (c)—Add *Cooper v. Vesey*, 20 Ch. Div. 611.
- P. 741, n. (t)—Add *Ex parte Harper, in re Pooley*, 20 Ch. Div. 685.
- P. 746, n. (p)—Add—But see *Anderson v. Butler's Wharf Co.*, 21 Ch. Div. 131.
- P. 747, n. (u)—Add *Clarkson v. Musgrave*, 9 Q. B. D., 386.
- P. 750, n. (j)—Add—See generally *Curtis v. Sheffield*, 21 Ch. Div. 1.

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# THE PRINCIPLES OF EQUITY.

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## PART I.—INTRODUCTORY.

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### CHAPTER I.

#### THE JURISDICTION IN EQUITY.

IN treating of Equity, it is essential to distinguish the various senses in which that word is used. In its most general sense, we are accustomed to call that equity which in the transactions of mankind is founded in natural justice, or in honesty and right, and which properly arises ex æquo et bono. But it would be a great mistake to suppose that equity, as administered in the courts, embraces a jurisdiction so wide and various as the principles of natural justice. There are, on the contrary, many matters of natural justice which the courts leave wholly unprovided for, from the difficulty of framing any general rules to meet them, and from the doubtful policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness. A large portion, therefore, of natural equity, in its widest sense, cannot be, at least is not, judicially enforced, but must be, or

at least is in fact, left to the conscience of private individuals (a).

Definition of equity,—by reference to its province or extent, and not its content.

Are we then to infer that the equity of the Court of Chancery represents the enforceable residue of natural equity, meaning by the word residue all that portion of natural equity which may be, and which in fact is, enforced by legal sanctions? Were we to arrive at that conclusion, we should not be far wrong, bearing in mind always the claims of the common law and of the statute law. The customary use of the term common law, it is true, contradistinguishes that law from equity strictly so called; nevertheless, the common law is as much founded in natural justice and good conscience as equity is; and if the common law until recently fell short of equity in its operation, its failure was to be attributed to defects in the *mode of administering* its principles rather than to any inherent weakness of or deficiency in the principles themselves. And, again, the enactments of the legislature embody and give legal sanction to many principles of natural equity which, though capable of being administered by the courts, had prior to these statutes been omitted to be enforced, from whatever cause. If therefore we bear in mind regarding natural justice, that a large portion of it cannot be, or in fact is not, enforced at all by any civil tribunals, and that another large portion of it is, and has always been, enforced in the Common Law divisions, and that a third part of it is enforced in the Common Law and in the Equity divisions indifferently, by virtue of legislative enactments,—we are in a position to indicate, approximately, the province of equity strictly and properly so called. For, putting aside all that part of natural equity that is sanctioned and enforced by or by virtue of legislative enactments, equity may then be defined as being that

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(a) *Green v. Lyon*, 21 W. R. 830.

Story - Equity is that portion of remedial justice which is  
 exclusively administered in a court of Equity as  
 contrasted & distinguished from that portion which is ex-  
 clusively administered in the courts of common law -  
 THE JURISDICTION IN EQUITY. 3  
 Taylor's defn of equity is same as Story's.

portion of natural justice which, though of such a nature as properly to admit of being judicially enforced, was, from circumstances hereafter to be noticed, omitted to be enforced by the Common Law divisions, and which the Chancery division, or Court of Chancery, for reasons of its own, enforced. In short, the whole distinction between equity and law may be said to be a matter not so much of substance or of principle, as of form and history. The distinction, nevertheless, is a broad and permanent one, and has not been materially affected by the recent so-called fusion of Law and Equity.

Before proceeding further, the student must endeavour to understand, with their proper limitations, the vague and inaccurate definitions or rather descriptions of equity, with which the text writers (chiefly the earlier ones) abound. Thus, one writer says that it

is the duty of equity "to correct or mitigate the rigour, and what, in a proper sense, may be termed the injustice, of the common law." Another holds that "equity is a judicial interpretation of laws, which, pre-supposing the legislature to have intended what is just and right, pursues and effectuates that intention."

Again, Lord Bacon lays it down, "*Habeant similiter Curiae Praetoriae potestatem tam subveniendi contra rigorem legis quam supplendi defectum legis*,"—which, being interpreted, means,—“In like manner, let the Courts of the Lord Chancellor have the power both of relieving against the rigour, and of supplying the defects, of the common law,”—and the maxim is explained by what the same learned philosopher said on the solemn occasion of his accepting the office of Chancellor; namely, that Chancery was ordained to supply the law, not to subvert the law.

All these definitions of equity are good (at least as descriptions of equity), so far as they go. In the early history of English equity jurisprudence, there

The older definitions of equity stated.

The older definitions of equity explained.



was probably much to justify them. The courts of equity were, it is probable, not then bounded in all cases by definite rules, but acted on principles of good conscience and natural justice, without much restraint of any sort. In fact, it is not easy to see how the courts of equity could do otherwise, in those early times when no definite rules had as yet been made or settled; and if the early Chancellors had not assumed to themselves (as representing the Sovereign and fountain of justice) the necessary powers, the English equity system would (and, in fact, could) never have acquired its present dignity and influence for good, or even have come into existence at all.

Equity in modern times, —character of:  
1. Courts of equity bound by settled rules and precedents.

2. Modes of interpreting laws the same in equity as at law.

But however indefinite may have been the functions of equity in its origin, there can be no doubt that the definitions or descriptions cited above do not sufficiently express the extent or character of equity at the present day. They would, in fact, mislead as definitions, and be inaccurate as descriptions, of modern equity. For a court of equity is now bound by settled rules as completely as a court of common law. The cases which occur are various, but they are decided upon fixed principles; and courts of equity have, as regards these principles of decision, no more discretionary power than courts of common law, but decide new cases by the principles of former cases, enlarging the operation of those principles, it is true, but not altering the principles themselves (b). Again, it is said that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound by, and equally profess to interpret laws according to, the true intent of the legislature. There is not a single rule of interpreting laws that is not equally used by the judges in both

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(b) *Bond v. Hopkins*, 1 Sch. & Lef. 428, 429; and see 3 Black. 432.

the Queen's Bench and the Chancery divisions; in fact, so far as the interpretation of laws is a question merely of construing enactments of the legislature, the construction in both divisions is necessarily the same. In both divisions, the distinction, *e.g.*, taken in Mr. Austin's Jurisprudence, between the *ratio legis* (*i.e.*, the principle of a statute) and the *ratio decidendi* (*i.e.*, the principle of a decided case), is strictly observed and acted upon, that is to say, the *ratio decidendi* alone is considered of weight in interpreting and in applying decided cases; and, on the other hand, in interpreting and applying the statute law, if the words of the statute are clear, they alone are regarded, and the *ratio legis* receives no weight at all, but is considered (for whatever weight it has), together with other *indicia* of interpretation, if (and only if) the words of the statute in themselves are not clear (c).

*See rules laid down in Heydon's case and Golden rule, infra.*

Having thus indicated generally the nature and the province of equity, it remains to trace the origin of the distinction in England between common law and equity,—a distinction which is not without its parallel in the systems of jurisprudence in other countries also.

It is a well-known fact that, during the Anglo-Saxon and early Norman periods of English history, the principles of the civil law were familiar to the clergy, the great repositories of learning in early times; and that the clergy being in those days the expounders and administrators of the law, imported into their decisions or expositions of it many of the principles, and much also of the practice, of the Roman law (d). And early in the twelfth century, shortly after the discovery of the Pandects, schools for the study of the Roman, *i.e.*, civil law, were established in England, *e.g.*,

Origin of the jurisdiction in equity.

(c) *Heydon's case*, 3 Rep. 7; Dwarries on Statutes, 2d ed., 563.

(d) 1 Sp. 16.

the school of Irnerius at Oxford. The familiar study of the civil law would, but for the untoward circumstances hereinafter mentioned, have gone far to obviate the necessity for any distinction between the jurisdictions of equity and of common law in England, and in this precise way, viz., the Roman law itself had from natural causes developed in the course of its history the like distinction, and had afterwards invented and effectively applied a method for abolishing, and had in fact abolished, the distinction. So that the English law had merely to receive instruction from the Roman law, in order to forestall the growth of the distinction; but various circumstances have from time to time operated to prevent, and have prevented, the complete incorporation of the principles and practice of the Roman law into the English law. And in point of fact, the English law, it will be found, probably from being left to its own natural genius, has pursued a course remarkably analogous to the Roman law in its historical development; that is to say, it has first developed the distinction between law and equity, and it has eventually invented and successfully applied a method for abolishing that distinction,—in the common fusion of the two.

Reasons of separation between the two systems,—common law and equity.

1. The common law became a *jus strictum* rather early.

1. It has always been admitted, and we have already stated, that the principles of the common law are founded in reason and equity; so long therefore as the common law was in the course of its formation, it was capable—as indeed it ever continued to be to some extent—not only of being extended to cases not expressly provided for by, but falling within the spirit of, the existing law, but also of having the principles of equity applied by the judges in their decisions, as circumstances arose which called for the application of such principles. But in the course of time, and at a very early time, the common law appears to have completed its development, like a girl does her educa-

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tion; in other words, the common law became to a great extent a *jus strictum*, i.e., a system positive and inflexible, too early; and the rules of justice could not (or, at all events, would not and did not) accommodate themselves to the exigencies of new circumstances and new cases (e).

1<sup>st</sup> reason

2. The Roman law, on the other hand, was incapable of universal application; e.g., the laws governing the tenure of land in England were founded on feudal principles, and involved distinctions, which, although not altogether alien to the doctrines of the Roman law, were most inadequately expressed therein. Moreover, the Roman law, even in its limited applicability to England, received from temporary and regrettable occasions a severe and lasting check in England. For it appears, judging at least from the current histories, that in the reign of Edward III. the court of Rome had become odious to the English king and people; and that an almost general dislike, on the part of the laity at least, to everything connected with the Holy See had begun to spring up. The very name of the Roman law became (it is alleged) the object of aversion. And in the next following reign of Richard II. the barons protested that they never would suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited (at least, as of authority) in the common law tribunals (f).

2. The Roman law was deprived of authority in the courts.

2<sup>nd</sup> reason

This general discouragement of the Roman law operated, of course, to aggravate the already positive and inflexible character of the common law. And this inflexibility was still further aggravated and perpetuated (at least, for centuries) by the next following cause of the separation between law and equity.

3<sup>rd</sup> reason

(e) 1 Sp. 321, 322.

(f) 1 Sp. 346.

3. The system of procedure at common law was even more inflexible than the principles themselves of the common law.

3. -Notwithstanding the obstacles aforesaid, the courts of common law might have become much more useful than they in fact did, had they not adopted an inflexible, inelastic, and cramping system of procedure. To the adoption of this inflexible procedure may be proximately attributed, though concurrently with the other causes noticed above, the eventual rise and rapid progress of the Court of Chancery as a separate jurisdiction.

4<sup>th</sup> - reason

According to the common law every species of civil wrong was supposed to fall within some particular class, and for every such class of wrong an appropriate remedy existed. The remedy in question assumed the form of a *writ* or *BREVE*; and the writ or *breve* was the first step in every action. Thus, if a man had suffered an injury, it was not competent for him to bring to the notice of a court of law the facts of the case in a simple and natural manner by merely stating them, leaving the court to say whether upon the facts stated the case was one deserving of redress; but he had first to determine within what class of wrong his case fell, and then to apply for the appropriate remedy or writ. The evil effects of this system of procedure showed themselves in a twofold way:—

- (a.) Even where the facts were such as to bring the alleged wrong within some one of the classes recognised at common law, the suitor was exposed to the risk of selecting the improper writ, and merely on that account failing in his action. This technical stumbling *in limine*, although from time to time relieved by subsequent legislation, continued to be a fertile source of injustice until the Common Law Procedure Act of 1852 (15 & 16 Vict., cap. 76), sec. 3, enacted that it should not be necessary for a plaintiff to mention any form of action in his writ of summons (g).

(g) *Sharrod v. N. W. R. Co.*, 4 Exch. Rep. 580.

2. (b.) Another evil of the then system of procedure was, that if the alleged wrong did not fall within any recognised class of writ, the plaintiff was absolutely without any remedy at all. The writ was inflexible and not capable of adaptation. This second evil appears to have been very early felt; for in the 13 Edw. I. a remedy was attempted for it.

4. At that time the writ for commencing actions at law was an original writ issuing out of the Chancery, and the drawing up of the writ was a part of the business of the clerks in Chancery. The remedy that was attempted was to give a larger discretion to the clerks in Chancery in the framing of writs. It was accordingly enacted by the 13 Edw. I., stat. 1, cap. 24, that "whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case falling under like law and requiring like remedy none is found, the clerks of the Chancery shall agree in making the writ, or the plaintiff may adjourn it until the next Parliament; and the cases in which the clerks cannot agree are to be written and referred by them unto the next Parliament, and by agreement of men learned in the law a writ is to be made, lest it should happen that the court should long time fail to minister justice unto complainant."

4. "The Statute in Consimili Casu," —attempted a remedy but failed.

This enactment, which is commonly called "The Statute in Consimili Casu," proved wholly inadequate to meet the evil complained of, and that for the two following reasons, viz. :—

1. (aa) The judges of the common law courts assumed, and very properly assumed, a discretionary jurisdiction to decide on the validity of the writs as adapted by the clerks in Chancery (h). Probably many of the

adaptations were both clumsy and impractical, and so lengthy and verbose as to render the writ or *breve* a misnomer. Anyhow, the common law judges refused to recognise them in very many instances.

2. (bb.) The progress of society and of civilisation, by giving rise to novel and unusual circumstances, increased the difficulty which the clerks in Chancery experienced in adapting new cases to old forms; and, no doubt, their well-meant efforts only further aggravated the judges of the courts of common law. This occasion of difficulty was of course destined also to go on increasing. And further, in addition to new forms of *action*, new forms of *defence* also arose, for which no provision had been made (i), and which necessarily therefore fell beyond the jurisdiction of the common law (j).

5. The Lord Chancellor, by direction of the Sovereign and of Parliament, personally intervened, at length, in 22 Edw. III.

Ordinance of 22 Edw. III. as to matters "of grace."

(5.) When the common law judges could not or would not grant relief, the only course open to suitors was to petition the king in Parliament or in council; whereupon the sovereign generally referred the matter to the "keeper of his conscience," the Chancellor; until ultimately, in the reign of Edward III., the Chancellor came to be recognised as a permanent judge, and the Court of Chancery as a permanent jurisdiction, distinct from the judges and from the courts of the common law, and empowered to give relief in cases which required extraordinary relief. The last-mentioned king, in the twenty-second year of his reign, by an ordinance referred all such matters as were "of grace" to the Chancellor or Keeper of the Great Seal (k); and from that time, suits by petition or bill, without any preliminary writ, became the common course of procedure before the Chancellor, *i.e.*, in the Court of

(i) 1 Sp. 325.

(j) See 17 and 18 Vict., c. 125, s. 83.

(k) 1 Sp. 337.

Chancery. On this bill or petition being presented, it was at once looked into by the Chancellor, and if the Chancellor thought that the case called for extraordinary relief, a writ called a writ of *subpœna* was issued by command of the Chancellor, in the name of the king, *summoning the defendant to appear before the Chancery to answer the complaint, and to abide by the order of the court.* The personal examination of the bill or petition by the Chancellor was afterwards dispensed with, the signature of counsel to the bill or petition being accepted as a guarantee that the case was a proper one, sufficient to authorise the immediate issue of the writ of *subpœna* (i). Subsequently to and in consequence of the Chancery Jurisdiction Act, 1852 (15 & 16 Vict., c. 86), the writ of *subpœna* to appear to and answer the complaint was superseded, and was replaced by a mere indorsement of a writ to the like effect on the copy of bill served on the defendant. In effect, therefore, the bill became and was simply the first pleading on the part of the plaintiff in an action (or suit, as it was more commonly called) in the Court of Chancery.

By and in consequence of the Judicature Acts, 1873-81, and the rules and orders from time to time made thereunder (m), law and equity have in substance and effect been fused into one system, and a uniform system of procedure in the Chancery division, and in the Queen's Bench division, has been introduced and become established. The particular steps in that new procedure will be found detailed in Book the Second of this Treatise, *i.e.*, under the "Practice in Equity;" it is sufficient to mention here, in order to complete the historical outline of the origin of the Jurisdiction in Equity given above, that an action (as it is now

(i) Langdell's Summary of Equity Pleading.

(m) See Griffith and Loveland's Practice under the Judicature Acts, 2d ed.



called) in the Chancery division of the High Court is now commenced, as in the Queen's Bench division, by issuing a writ, which may or may not be (but usually is) followed up by a statement of claim on the part of the plaintiff, such statement of claim corresponding (excepting in, for the present, immaterial respects) with the old bill or petition to the Lord Chancellor, and being as heretofore the first pleading properly so called on the part of the plaintiff in an action.

Classification of equity jurisdiction,—prior to, and so far also as affected by, the Supreme Court of Judicature Act, 1873.

Prior to the Judicature Acts, 1873–81, it was usual, in treatises on equity, to classify the various subject-matters falling within the jurisdiction of equity *by relation to the common law*, and accordingly to subdivide the jurisdiction into, and to arrange these various subject-matters under, three heads, viz, the *exclusive*, the *concurrent*, and the *auxiliary* jurisdictions in equity. However, now by the Supreme Court of Judicature Act, 1873, it is enacted, that in every civil cause or matter, law and equity shall be administered *concurrently*; that each division of the High Court and the judges thereof shall have, and shall exercise, all the jurisdiction of the other division or of the judges thereof, in addition to their own original or proper jurisdiction; and that where there is any conflict or variance between the rules of equity and the rules of the common law, the rules of equity shall prevail (n). But by the 34th section of the same Act, it is expressly enacted that there shall be assigned (subject to the general provisions of the Act) to the Chancery division (besides other matters not material to specify) all causes and matters for any of the purposes specified in the now stating section, and being the following various matters, that is to say,

- I. The administration of the estates of deceased persons;

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(n) 36 & 37 Vict., c. 66, ss. 24, 25.

2. The dissolution of partnerships, and the taking of partnership and other accounts;
3. The redemption and foreclosure of mortgages;
4. The raising of portions and other charges on land;
5. The sale and distribution of the proceeds of property subject to any lien or charge;
6. The execution of trusts, charitable and private;
7. The rectification, the setting aside, and the cancellation of deeds and other written instruments;
8. The specific performance of contracts between vendors and purchasers of real estate, including contracts for leases;
9. The partition or sale of real estates; and
10. The wardship of infants, and the care of infants' estates.

*Si autem no  
causes or matters  
are assigned ex-  
clusively to the  
Chancery Division*

The effect, therefore, of the Act is, nominally, to put an end to the *exclusive* jurisdiction as such, of the Court of Chancery, and to render that jurisdiction concurrent in all cases; but the effect of it, practically, is to retain as exclusive all that part of the jurisdiction which was originally exclusive; on the other hand, the effect of the Act, as regards the *auxiliary* jurisdiction of Chancery, is to abolish that jurisdiction altogether, both nominally and practically,—*scil.* because the suitor in the Queen's Bench division now no longer stands in any need of the *aid* (auxilium) of the Chancery division for the proper and effective conduct of his action.

Prior to the abolition of the threefold distinction aforesaid, the exclusive jurisdiction of equity (and which must now be distinguished as the *originally exclusive* jurisdiction of equity) extended to and embraced all those matters above specified which the Judicature Acts have assigned exclusively to the Chancery division, being generally all matters

1. The originally exclusive jurisdiction.

capable of being judicially enforced, but for which no forms of action were available at law.

II. The originally concurrent jurisdiction.

Furthermore, equity always had, even before the Judicature Acts, a concurrent jurisdiction with the courts of common law in every legal matter where no complete relief could be obtained at law except by circuity of action, or by multiplicity of suits, and complete relief could be given in equity in one and the same action.

It is to be observed that the distinction between matters which were and are within the originally exclusive jurisdiction and the originally concurrent jurisdiction of equity is still of vital importance,—it being equitable rights and remedies properly so called that are enforced and applied in the originally exclusive jurisdiction, while it is legal rights and remedies that are enforced and applied in the originally concurrent jurisdiction.

III. The now obsolete auxiliary jurisdiction.

The now obsolete auxiliary jurisdiction of equity was a jurisdiction which equity afforded in certain cases to litigants in the courts of common law, *in aid* of the assertion of their legal rights in such courts, where they had an equitable title to such aid, and the courts of law did not themselves recognise such equitable title, or could not or would not afford such aid. The kind of aid which equity afforded in such cases was principally in the matter of the discovery of title-deeds and other evidences of the alleged rights of the litigants,—and the litigants may now obtain all such aid from the Queen's Bench division itself, provided always they might formerly have obtained it in equity, but not otherwise.

It follows from these considerations, that the ancient threefold distinction of equity into the exclusive, the concurrent, and the auxiliary jurisdictions is still attended with too many consequences in law to be thrown over lightly; and it is accord-

ingly retained in this edition of "The Principles of Equity." Its retention cannot mislead the student who peruses this Introductory Chapter; and on the other hand, there are many utilities which flow from its retention, as will in due course appear.

## CHAPTER II.

## THE MAXIMS OF EQUITY.

EQUITY is pre-eminently a science; and like geometry or any other science, it starts with and assumes certain maxims, which are supposed to embody and to express the fundamental notions of the science. A common element of equity pervades each of the maxims, which sometimes gives them the appearance of running into each other; but with a little practice they are readily distinguishable; and it is highly necessary to keep the distinctions between them clear. The maxims peculiar to equity are the eleven following:—

Maxims of  
Equity.

1. Equity will not, by reason of a merely technical defect, suffer a wrong to be without a remedy.
2. Equity follows the law,—*Æquitas sequitur legem.*
3. Where there are equal equities, the first in time shall prevail.
4. Where there is equal equity, the law must prevail.
5. He who seeks equity must do equity.
6. He who comes into equity must come with clean hands.
7. Delay defeats equities,—*Vigilantibus non dormientibus, æquitas subvenit.*
8. Equality is equity.
9. Equity looks to the intent rather than to the form.
10. Equity looks on that as done which ought to

have been done, or which has been agreed or directed to be done ; and

11. Equity imputes an intention to fulfil an obligation.

And to these eleven maxims may be added a further or twelfth maxim, relating, however, to the procedure in a court of equity, and not to the principles themselves of equity, viz.,—

12. Equity acts *in personam*.

1. *Equity will not, by reason of a merely technical defect, suffer a wrong to be without a remedy.*—It will be evident that this maxim is at the foundation of a large proportion of equity jurisprudence, so far as that jurisprudence aims at supplying the defects which at one time existed in the common law. For example, in the case of an outstanding dry legal term, prior in date to the plaintiff's title to an estate,—and which term, although a merely technical objection, would at law have prevented the plaintiff from recovering in ejectment,—the court of equity interposed to put the term out of the plaintiff's way, and even permitted him by means of an "ejectment-bill," as it was called, to recover the very possession of the land itself without regard to the term. Similarly, in the case of a mortgagor seeking to recover an estate or rent, the fact of the legal estate being in the mortgagee was no impediment in equity ; and under the Judicature Act, 1873, sect. 25, sub-sect. 5, the rule in equity is made to prevail for the future at law also. The maxim must, however, be understood with the following limitations,—it must be understood as referring to rights which come within a class enforceable at law, or capable of being judicially enforced, and the enforcement of which would not occasion a greater detriment or inconvenience to the public than would result from

leaving them to be disposed of *in foro conscientie*; and in enunciating the maxim, it should always be remembered that many real wrongs are not remediable at all, either at law or in equity; and that a still larger class of apparent wrongs are not wrongs at all, excepting in the imagination of the suitor; of course, the maxim does not apply to such.

2. Equity follows the law.

2. *Equity follows the law.*—This maxim has two principal applications, viz. :—

(a.) In its originally concurrent jurisdiction, that is to say, as regards *legal* estates, rights, and interests, equity is strictly bound by the rules of law, and has no discretion to deviate from them.

(b.) In its originally exclusive jurisdiction (including for this purpose its originally but now obsolete auxiliary jurisdiction also), that is to say, as regards *equitable* estates, rights, and interests, equity, although not strictly speaking *bound* by the rules of law, yet acts in analogy to these rules, wherever an analogy exists.

(a.) Originally concurrent jurisdiction: Primogeniture, and rules of descent generally.

(a.) As an illustration of the first application of this maxim, it is well settled that equity follows the law as to the rule of primogeniture, although that rule, in any particular instance in which it is so followed, may be productive of the greatest hardship towards all or some or one of the younger members of a family, by leaving them, for example, without any sort of provision, while the eldest son may be in affluence. These accidental circumstances create no equitable right or equity in favour of the youngest son against the eldest, and do not demand the interposition of a court of equity. The absence of any provision may be a circumstance arising from the culpable neglect of the parent, but it creates no equity against the eldest son,

who has a legal right to the descended or entailed estate ; and a court of equity cannot "subvert the law."

On the other hand, where the circumstances are in themselves sufficient to create an equity, then even there a court of equity never does break through a rule of law, or refuse to recognise it, because it has no power and no discretion in the matter ; but while recognising the rule of law, and even founding upon it and maintaining it, a court of equity will in a proper case get round about, avoid, or obviate it. For example, if an eldest son should prevent his father from executing a proposed will devising one estate to a younger brother, by promising to convey such estate to such younger brother, and that estate should accordingly descend at law to the eldest son *as a consequence flowing from his promise, which was the cause*, a court of equity would interpose and say,—“True it is, you (the eldest son) have the estate at law, in other words, the legal estate ; that we don't deny or interfere with ; but precisely because you have it, you will make a convenient trustee of it for your younger brother, who (in our opinion) is equitably entitled to it, *scil.* because, but for your promise, he would have had it.”

Following the law, equity may at the same time avoid it in effect.

And again, in *Loffus v. Maw* (a), a testator in advanced years and in ill-health induced his niece to reside with him as his housekeeper, on the verbal representation that he would leave her certain property by his will, which he accordingly prepared and executed, but subsequently by a codicil revoked. The court directed that the trusts of the will in favour of the niece should be performed. It held, that in cases of this kind, a representation that property is to be given, even though by a revocable instrument, is binding,

*Loffus v. Maw* —instance of equity avoiding the law.

(a) 3 Giff. 592. And see *Meluish v. Milton*, L. R. 3 Ch. Div. 27 ; also *Alderson v. Maddison*, 5 Exch. D. 293 ; and on app. 7 Q. B. D. 174.



where the person to whom the representation is made has acted upon the faith of it to his or her detriment; and that it is the law of the court, *grounded on such* *X detriment*, that makes it binding; and that it does not matter that the represented mode of gift is of an essentially revocable character. There is here no setting aside of law; but there is the like avoiding of law as in the former case. *Re John Ruck.*

(b.) Originally exclusive jurisdiction: Words of limitation in deeds and wills,—trusts executed, and trusts executory.

(b.) As an illustration of the second application of the maxim now being explained, it may be mentioned (but only briefly in this place, as the matter will be considered at proper length in the following chapter, upon Trusts), that in construing the words of limitation of trust estates in deeds and wills, at least where the trust estate is executed, and in some cases even where it is executory also, a court of equity follows the rule of law familiarly identified as the rule in Shelley's case, and also observes all the other rules of law for the construction of the words of limitation of legal estates. But where the trust estate is executory only, and the court sees an intention to exclude the rules of law for the construction of the words of limitation, then, and in that case, the court carries out the intention in analogy to the rules of law, but not in servile obedience to them, where such obedience would defeat the execution of the intention.

(a. and b.) Originally concurrent and originally exclusive jurisdictions: The Statutes of Limitation.

(a. and b.) As an illustration of the maxim in both of its applications we may refer to the manner in which equity deals with the statutes of limitation for actions and suits. The old statutes of limitation were in their terms applicable to courts of law only; nevertheless, equity by analogy acted upon them, and refused relief under like circumstances. On the other hand, the modern statutes of limitation (3 & 4 Will. IV., c. 27, and 37 & 38 Vict., c. 57) are in their very terms applicable to courts of law and of equity indifferently.

Moreover, apart from any statutes, and for reasons of its own, equity always discountenanced and still discountenances laches, and held and holds that laches is presumable in cases where it is positively declared at law. Thus, in cases of equitable title to land, equity required and requires relief to be sought within the same period in which an ejectment would lie at law (b); and in cases of personal claims, it also required and requires relief to be sought within the period prescribed for personal suits of a like nature (c). And although there are not (because there could not be) any cases where the statutes would be a bar at law, in which equity has given or could give relief; yet, on the other hand, there are many cases where the statutes would not be a bar at law, in which equity has notwithstanding refused relief. In other words, the rule of equity regarding the statutes of limitation may be stated (and it is believed, with accuracy) thus,—that in its originally exclusive jurisdiction equity never exceeds, although, for reasons of its own (such as laches, &c.), it often stops a long way short of or within the limit of time prescribed at law; and that, in its originally concurrent jurisdiction, equity never either exceeds or abridges the limit of time prescribed at law (d). This exemplifies the twofold operation of the maxim under discussion, equity in its originally concurrent jurisdiction being a slave to law, and in its originally exclusive jurisdiction being free (within the limits of law) to give weight to considerations of its own. And *nota bene*, time runs both at law and in equity from the discovery of the fraud (where the action is grounded on fraud), and not from the perpetration of the

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(b) *Beckford v. Wade*, 17 Ves. 99.

(c) *Knox v. Gye*, L. R. 5 H. L. 656; 21 Jac. I., c. 16; 9 Geo. IV., c. 14; 19 & 20 Vict., c. 97 (simple contract claims); 3 & 4 Will. IV., c. 42 (specialty contract claims).

(d) *Fullwood v. Fullwood*, 9 Ch. Div. 176.

fraud (e); and this therefore is no exception to the rule.

3. *Qui prior est tempore, potior est jure.*

True statement of rule.

3. *Qui prior est tempore, potior est jure.*—Where equities are equal, the first in time shall prevail. This maxim has been understood by some as meaning, that as between persons having only equitable interests, *Qui prior est tempore, potior est jure*—but this proposition is far from being universally true (f); it is in fact a very inaccurate statement of the rule. The rule may be correctly stated thus,—that, as between persons having only equitable interests, if such equities are in all other respects equal, *Qui prior est tempore, potior est jure*; in other words, that in a contest between persons having only equitable interests, priority of time is the ground of preference *last resorted to*; i.e., that a court of equity will not prefer one to the other on the mere ground of priority of time, until it finds, on an examination of their relative merits, that there is no other sufficient ground of preference between them (g). Thus where A., B., C., three vendors entitled in common to a piece of land, sold the land to D.; and on the day for completion of the purchase, A., B., and C., all attended at the office of their solicitor, when D. paid A. and B. their respective shares of the purchase-money, but put off C. (who was a friend) until the day following, having promised C. faithfully to pay him his proportion of the purchase-money on that following morning; and then A. and B., and also C., executed the deed of conveyance to D., in which the payment of the *entire* purchase-money was acknowledged by A. and B., and also by C., and A. and B. and also C. severally also signed receipts indorsed on the deed of conveyance for their respective purchase-moneys; and

(e) 3 & 4 Will. IV., c. 27, § 26; *Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59. (f) *Loveridge v. Cooper*, 3 Russ. 30.

(g) *Rice v. Rice*, 2 Drew, 73. And see *Spencer v. Clarke*, 9 Ch. Div. 137; *Pilgrem v. Pilgrem*, 18 Ch. D. 93.

thereupon C. negligently let D. take away the deed of conveyance (together with the other deeds) in his bag, and D. the same afternoon deposited the deeds with his bankers and never paid C. at all,—the court held, that as between the bankers (equitable mortgagees by deposit) and C. (unpaid vendor having equitable lien), the bankers, although second in date, were first in right, because of C.'s negligence (h). *Rule & Case*

4. *Where there is equal equity, the law must prevail.*—This maxim may be thus explained: If the defendant has a claim to the passive protection of the court equal to the claim which the plaintiff has to call for the active aid of the court, he who has the legal estate will prevail; for in such a case the Court will do simply nothing, and the legal estate will remain unaffected. Thus, in the case of *Thorndike v. Hunt* (i), where the trustee of a sum of stock for T. was ordered, in a suit instituted by his *cestui que trust*, T., to transfer the money into court, and the transfer was made, and the fund was treated as belonging to T.'s estate, and the legal estate, therefore, vested in the Accountant-General (now Paymaster-General), for the purposes of T.'s trust; and it afterwards appeared that the trustee had provided himself with the means of paying T.'s fund into Court by fraudulently misappropriating funds which he held in trust for another *cestui que trust*, B.,—upon the question whether B. had a right to follow the money into court as against T.'s estate, the Court held that B. had no such right, and for the following reasons:—That the transfer into court was for valuable consideration, because there was a debt due from the trustee to T.'s estate; that B.'s right or equity to follow the money was no greater than T.'s right to retain it; and that the circumstance that the legal title was held for T. was

4. Where there is equal equity, the law must prevail.

(A) *Rice v. Rice*, 2 Drew, 73.

(i) 3 De G. & Jo. 563.

sufficient to create a preference in favour of T. as against B. (j).

Defence of purchase for valuable consideration without notice.

The third and fourth maxims find their principal application in cases where a defendant sets up the defence that he has purchased for valuable consideration without notice of the plaintiff's adverse title; and it is proposed therefore to direct the attention of the student to the various cases in which that defence may or may not be made available.

(a.) Plaintiff having equitable estate only, defendant legal estate and equitable estate both.

1. Where purchaser obtains the legal estate at the time of purchase.

A. B.

*Rule 1.* Where the defendant who sets up the defence has the legal estate, or even the best right to call for the legal estate, a court of equity will grant no relief against him.

Nothing can be clearer than the general rule that a purchaser for valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the fourth maxim, Where the equities are equal the law must prevail. Thus if A., the owner of an estate, contracts with B. to sell it to him, and B. pays a part of the purchase-money, but the conveyance to him is not actually executed; and then A., after this contract of sale with B., makes an absolute sale and conveyance of the legal estate to C., who purchases it for valuable consideration without notice of B.'s claim; here, as C. has the legal estate in him, and has besides purchased *bonâ fide* for value without notice, and his equity to retain the estate is equal to B.'s right to enforce his equitable claim to it, therefore the court of equity refuses to give B. any relief as against C.

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(j) *Stackhouse v. Jersey (Countess)*, 1 J. & H. 721; and see *Fraser v. Murdoch*, 6 App. Ch. 855.

Not only, however, will a purchaser for valuable consideration without notice who obtains the legal estate at the time of his purchase be protected, but such a purchaser who has not obtained the legal estate at the time may protect himself by *subsequently getting in the outstanding legal estate*, so long as he does not by that act become a party to a breach of trust (*k*); because, as the equities of both parties are equal, there is no reason why such a purchaser should be deprived of the advantage he obtains at law by superior diligence (*l*).

2. Where purchaser gets in the legal estate subsequently.

And not only where such a purchaser has *actually obtained*, but also where he has the *best right to call for* the legal estate, will he be entitled to the protection of equity. Thus in *Wilmot v. Pike* (*m*), a first mortgage of the X. estate was made to A. in fee. A second mortgage in 1826 was then made to B. of the same estate, together with the Y. estate by a conveyance of the respective premises to C. as a trustee for B. B. afterwards, in 1835, advanced a further sum to the mortgagor on the security of the estates X. and Y., but gave no notice of the further advance either to A. or to C. Subsequently C., in 1840, after inquiry of A. whether he had notice of any encumbrance other than his own and that of which C. was trustee for B., advanced a further sum on his (C.'s) own account to the mortgagor on the same security, and gave notice of his mortgage to A. The question arose between B. and C. in respect of the third and fourth mortgages of 1835 and 1840 respectively, as to which was entitled to priority. It was held that as to the X. estate, B. was entitled to priority over C., according to the maxim, *Qui prior est*

3. Where purchaser has the best right to call for the legal estate.

(*k*) *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Ha. 272.  
 (*l*) *Goleborn v. Allcock*, 2 Sim. 552; *Pilcher v. Rawlins*, 7 L. R. Ch. 259, distinguishing *Carter v. Carter*, 3 K. & J. 617; and see *Phillips v. Phillips*, 10 W. R. 237; 31 L. J. Ch. 321; 8 Jur., N. S. 145; 5 L. T., N. S. 665.  
 (*m*) 5 Hare, 14.

*tempore, potior est jure*; for as regarded that estate, B. and C. had only equitable interests, the legal estate being outstanding in A., the first mortgagee. But as to the Y. estate, C., the fourth mortgagee, having the legal estate in him, although as trustee only, and having advanced his money without notice of B.'s further advance in 1835, was entitled to priority over B. as regarded such further advance. In such a case, if C. had been a stranger, he might have called for the legal estate from the trustee thereof; and that being so, C. the trustee could not be precluded by his situation as trustee from claiming the benefit of the legal estate.

What constitutes the best right to call for the legal estate?

A purchaser for value or mortgagee, having obtained possession of all title-deeds, would likewise have the best right to call for the legal estate; and of course also a subsequent purchaser for value or a mortgagee would have the best right as against a volunteer (n).

(b.) Plaintiff having legal estate and defendant the equitable estate :  
(aa.) The now obsolete auxiliary jurisdiction.

*Rule 2.* Where an application was made to the now obsolete *auxiliary* jurisdiction of the court, as contradistinguished from its originally *concurrent* jurisdiction, by the possessor of a legal title, and the defendant pleaded he was in possession as a *bond fide* purchaser for value without notice, the defence was good, and the court gave no aid to the legal title; and apparently now the High Court would give no aid either by way of *discovery* in such a case. This branch of the subject will be illustrated by the following cases :—

*Basset v. Nosworthy*,—discovery simply.

In *Basset v. Nosworthy* (o), a bill was filed by an heir-at-law, claiming, under an alleged legal title, against a person claiming as purchaser from the devisee under the will of his ancestor, but which will the plaintiff alleged had been revoked; and the prayer of

(n) *Buckle v. Mitchell*, 18 Ves. 100.

(o) 2 L. C. 1.

the bill was for discovery of the revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration, *bona fide*, without notice of any revocation; and this defence was allowed. Of course, the plaintiff might afterwards have proceeded at law in an action of ejectment, endeavouring there to make out his case upon his own evidence; and he may now do so, in an action to recover the possession of the land, but in such an action he is not entitled to any discovery.

Again, in *Wallwyn v. Lee* (p), a tenant in tail, in possession under a marriage settlement, filed a bill for the delivery up of certain title-deeds, which he alleged were the title-deeds of an estate which had been mortgaged by his father, but who was only tenant for life under the settlement; and the defendant pleaded that plaintiff's father, alleging himself to be seized in fee, and being in actual possession as apparent fee-simple owner, and being also in possession of the title-deeds as apparent fee-simple owner, executed the several mortgages under which the defendant claimed, and the defendant averred that he had no notice of the alleged fact that the plaintiff's father was only tenant for life. It was necessary for the plaintiff to have discovery of the deeds in order to show that they were in fact the title-deeds of the settled estate, and so to make out his claim to have them delivered up. Lord Eldon held, that the defence to the discovery was good, and dismissed the bill; and the High Court would also now in a like case do the like. But of course, if the plaintiff should show by his own evidence, without discovery to aid him, that he had a right to the title-deeds in question, he would now have judgment for their delivery up, according to his legal right (q).

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(p) 9 Ves. 24.

(q) *In re Cooper, Cooper v. Vesey*, 20 Ch. Div. 611.



The principle  
stated.

The principle of the last-mentioned decision was followed in *Joyce v. De Moleyns* (r), where Lord Chancellor Sugden said, speaking of this defence: "Suppose  
"a tenant for life under a will with remainder over,  
"and that the tenant for life, being also heir-at-law of  
"the testator, conveys the inheritance to a purchaser,  
"without notice; the remainderman cannot have any  
"relief in equity against the purchaser, but *must establish his title outside of this court as well as he can*. It  
"is the same with respect to title-deeds. The defendants  
"can make no use of the title-deeds themselves; they  
"cannot maintain possession of them against the true  
"owner; but in this court they have a right to say that  
"they ought not to be compelled to deliver them up, as  
"they obtained them *bona fide* and without fraud."

(bb.) Originally  
concurrent  
jurisdiction.

But this rule does not apply where the Court of Chancery, *concurrently* with courts of common law, afforded legal as distinguished from equitable relief. Thus, in *Williams v. Lambe* (s), a widow filed a bill against a purchaser from her husband, claiming her dower; the defendant pleaded that he was a purchaser of the estate for value without notice of the vendor being married; but Lord Thurlow overruled the plea. The like decision was also given in a suit for tithes (t). And generally, the law at the present day may be thus stated,—that even as against a purchaser for value without notice, a plaintiff claiming legal rights, and proving those rights *without the aid of any discovery*, which it would have been, and would still be, inequitable to put the defendant to, will obtain in both divisions of the High Court, and in either of them indifferently, a judgment in accordance with his legal rights.

(r) 2 J. & L. 374. See also *Heath v. Crealock*, L. R. 18 Eq. 215; and, on appeal, 10 Ch. App. 22. (s) 3 Bro. C. C. 264.

(t) *Collins v. Archer*, 1 Russ. & My. 284; see also *Finch v. Shaw*, 19 Beav. 500; and Lord Westbury's remarks in *Phillips v. Phillips*, 8 Jur. N.S. 145; 10 W. R. 237; 31 L. J. Ch. 321; 5 L. T. N.S. 655.

*Rule 3.* Where neither the plaintiff nor the defendant has the legal estate or the best right to call for it, but each has an equitable estate only, the court neither gave nor gives any aid or preference to either, but determines their rights by reference to their respective dates. (c.) Plaintiff having equitable estate only, defendant also having equitable estate only.

This rule is well expressed in the words of Lord Westbury in *Phillips v. Phillips* (u): "Now I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled in equity passes only that which he is justly entitled to, and no more. If, therefore, a person possessed of an equitable estate, *the legal estate being outstanding*, makes an assurance by way of mortgage, or grants an annuity and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely, the estate subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and encumbrancers claiming only in equity take and are ranked (*scil.* in the absence of exceptional circumstances) according to the dates of their securities, and the maxim applies *Qui prior est tempore, potior est jure*. The first grantee is *potior*, that is, *potentior*. He has a better and a superior, because a prior, equity."

Moreover, in cases falling within this third rule, it is quite immaterial whether the subsequent encumbrancers, at the time they took their securities and paid their money, had notice of the first encumbrance or not. Thus in *Ford v. White* (v), property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B.'s encumbrance; Notice of first encumbrance immaterial.

(u) *Supra*.

(v) 16 Beav. 220; and see *Hurpham v. Shacklock*, 19 Ch. Div. 207.

C. registered his mortgage before B., and afterwards assigned to D., who had no notice of B.'s mortgage. Held by Sir J. Romilly, M.R., that as C.'s interest was equitable, he could not, by assigning it to D. without notice, put him in a better situation than himself, and consequently that D. was not entitled to priority over B.,—the prior registration by C. notwithstanding.

(d.) Plaintiff having an equity merely, and not an equitable estate, defendant having both legal and equitable estates.

*Rule 4.* Where there are circumstances that give rise to an "equity," as distinguished from an "equitable estate;" for example, an equity to set aside a deed for fraud, or to correct it for mistake or accident, and the purchaser under the instrument puts forward the plea of purchase for valuable consideration without notice, the court will not interfere. Thus, in *Sturge v. Starr (w)*, a man, already married, performed the ceremony of marriage with a woman, and then joined with her in assigning her life-interest in a trust-fund to a purchaser. Held, that, though she might not have executed such an instrument had she been aware of the fraud practised upon her, that fraud could not affect the rights of a *bona fide* purchaser. This female had, doubtless, the strongest equity possible; but that equity, however strong *in se*, was no equity *as against the purchaser*.

The doctrine of notice.

In connection with the same third and fourth maxims, but almost exclusively in connection with the fourth maxim only, and in order to complete our understanding of them, it remains to consider the doctrine of Notice, and its effect in equity as between successive purchasers or mortgagees. Now no equitable doctrine is better established than that the person who purchases an estate, although for valuable consideration, *after notice* of a prior equitable estate or right, makes himself a *mala fide* purchaser, and will not be enabled,

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(w) 2 My. & K. 195; and see *Harpham v. Shacklock*, 19 Ch. Div. 207.

by getting in the legal estate, to defeat such prior equitable interest. Thus, in *Potter v. Sanders* (x) it was held that if a vendor should contract with two different persons successively for the sale to each of them of the same estate, and if the party with whom the second contract is made should, *after notice of the first contract*, procure a conveyance of the legal estate in pursuance of his second contract, the court would, in a suit for specific performance by the first vendee against the vendor and second purchaser, decree the latter to convey the estate to the plaintiff. And to such an extent has the effect of such notice been allowed to prevail, that the equitable doctrine has even infringed upon the policy of the Registration Acts. Thus, in *Le Neve v. Le Neve* (y), where lands in a register county, settled on a first marriage by deed which was not registered, were settled upon a second marriage, with notice of the former settlement, by deed which was registered pursuant to the statute, it was held that the former settlement should be preferred in equity to the latter settlement. "This is a species of fraud and *dolus malus* itself; for there is *express* knowledge that the first purchaser had the clear right to the estate, and with that knowledge an attempt is made to take away that right by getting in the legal estate,"—*scil.* the husband who registered the second settlement was the person to blame for not registering the first. But it requires a very strong case to get over the effect of the local Registry Acts, express notice amounting to fraud being required, and merely constructive notice not being sufficient (z).

It has long been settled, however, that if a person purchases for valuable consideration with notice, *from* Secus,—sub-purchaser with notice, if his

(x) 6 Hare, 1.

(y) 2 L. C. 35.

(z) *Lee v. Clutton*, 24 W. R. 106; and, on appeal, 942; 45 L. J. Ch. 43; *Bradley v. Riches*, 26 W. R. 910; 9 Ch. Div. 212.

vendor bought without notice. Or sub-purchaser without notice, though his vendor bought with notice.

a person who bought without notice, he may (provided he obtain the legal estate or have the best right to call for it) shelter himself under the first purchaser; for otherwise the first or *bonâ fide* purchaser would be unable to deal with his property, and the sale of estates would be very much clogged, and so also it has been long settled that, if a person who buys with notice sells to a *bonâ fide* purchaser for valuable consideration without notice, the latter may protect his title. Thus, in *Harrison v. Forth* (a), where A. purchased an estate with notice of the plaintiff's encumbrance, and then sold it to B., who had no notice, and B. afterwards sold it to C., who had notice, the court held that though A. and C. had notice, yet as B. had no notice, the plaintiff could not be relieved against the defendant C. But of course this rule is inapplicable where the sub-purchaser has only the equitable estate (b).

Notice of voluntary settlement does not affect subsequent purchaser.

A purchaser for valuable consideration of an estate, even with notice of a voluntary settlement, will not be affected by it, even though such voluntary settlement be in itself free from fraud, or even meritorious as a provision for relations (c). This is a consequence of the words of the statute 27 Eliz., c. 4, against fraudulent conveyances.

*In Ontario, if voluntary settlements be registered before subsequent sale for valuable consideration or a binding agreement to such sale - settlements provide.*

What constitutes notice.

Notice is either actual or constructive, but there is (in general) no difference between them in their consequences (d), although in exceptional cases (as has just been pointed out) constructive notice may not always have the effect of actual notice (e).

(a) *Prec. Ch.* 51; and see *At'y. General v. Biphosphated Guano Co.*, 11 *Ch. Div.* 327.

(b) *Ford v. White*, 16 *Beav.* 120; *Harpham v. Shacklock*, 19 *Ch. Div.* 207.

(c) *Buckle v. Mitchell*, 18 *Ves.* 100.

(d) *Prosser v. Rice*, 28 *Beav.* 68.

(e) *Le Neve v. Le Neve*, *supra*.

1. As to actual notice, it suffices to say, that in order to make it binding, it must be given by a person interested in the property, and in the course of the negotiations (f), and that vague reports from persons not interested in the property will not amount to actual notice; and further, that a mere assertion of title in some other person, or a mere general claim of title by some other person, does not amount to actual notice of such other title (g). On the other hand, if it can be shown that the knowledge is of a kind to operate upon the mind of any rational man, or man of business, and to make him act with reference to it, then it will amount to actual notice, and be sufficient to fix his conscience (h). Actual notice.

2. Constructive notice, on the other hand, is in its nature no more than evidence of notice, the weight of the evidence being such that the court imputes from it to the purchaser that he had notice (i). It is therefore not an easy matter to say what amounts to constructive notice in any particular case. In *Jones v. Smith* (j), Wigram, V.C., thus expressed himself upon the subject:—"It is scarcely possible to declare *a priori* what shall be deemed constructive notice, because unquestionably that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for present purposes, assert that the cases in which constructive notice has been established resolve themselves into two classes. Firstly, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has thereupon Constructive notice.

*Jones v. Smith,*  
—Constructive  
notice of two  
kinds.

1. Where  
actual notice  
of a fact,  
which would  
have led to  
notice of other  
facts.

(f) *Barnhart v. Greenhields*, 9 Moo. P. C. 18.

(g) *Sugd. V. & P.* 755.

(h) *Lloyd v. Banks*, L. R. 3 Ch. 488.

(i) *Plumb v. Pluitt*, 2 Anst. 438; *Henderson v. Graves*, 2 E. & A. 9.

(j) 1 Hare, 55.

2. Where inquiry purposely avoided to escape notice.

But mere want of caution is not constructive notice.

Examples of constructive notice.

"bound him with constructive notice of facts and  
 "instruments to a knowledge of which he would have  
 "been led by an inquiry after the charge, encumbrance,  
 "or other circumstance affecting the property, of which  
 "he had actual notice; and, Secondly, cases in which  
 "the court has been satisfied, from the evidence before  
 "it, that the party charged had designedly abstained  
 "from inquiring, for the very purpose of avoiding  
 "notice,—a purpose which, if proved, would clearly  
 "show that he had a suspicion of the truth, and a  
 "fraudulent determination not to learn it. If, in  
 "short, there is not actual notice that the property  
 "is in some way affected, and no fraudulent turning  
 "away from a knowledge of facts, which the *res gestæ*  
 "would suggest to a prudent mind, but if mere want  
 "of caution, as distinguished from fraudulent and  
 "wilful blindness, is all that can be imputed to the  
 "purchaser, then the doctrine of constructive notice  
 "will not apply; the purchaser will, in equity, be  
 "considered, as in fact he is, a *bonâ fide* purchaser  
 "without notice."

As an illustration of the first of these two kinds of constructive notice may be cited the case of *Bisco v. Earl of Banbury* (k). In that case, a person purchased with actual notice of a specific mortgage; the deed creating this mortgage referred to other encumbrances. Held, that the purchaser, knowing of the mortgage, ought to have inspected the deed, and that would have led him to a knowledge of the other deeds, and in that way the whole case must have been discovered by him (l). As an illustration of the second of the two kinds of constructive notice may be cited the

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(k) 1 Ch. Ca. 287; and see *Patman v. Harland*, 17 Ch. Div. 353; and disting. *Allen v. Seckham*, 11 Ch. Div. 790.

(l) *Ware v. Eymont*, 4 De G., M. & G. 473.

case of *Birch v. Ellames* (m). There the title-deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant, fourteen years after, upon the eve of the bankruptcy of the mortgagor, took a mortgage; he had notice of the deposit with the plaintiff, but avoided inquiring the purpose for which it was made. The court decreed for the plaintiff (n). And in explanation of what the court considers mere want of caution not amounting to constructive notice, it may be mentioned that the mere absence of title-deeds has never been held sufficient *per se* to affect a person with notice, if he has *bond fide* inquired for the deeds, and a reasonable excuse (e.g., that the wife made jelly covers of them) has been given for the non-delivery of them; for in that case the court cannot impute fraud or gross and wilful negligence to him (o). But the court will impute fraud or gross and wilful negligence to a person dealing respecting an estate if he omits *all* inquiries as to the title-deeds (p).

Example of mere want of caution.

In further illustration of the two preceding varieties of constructive notice, it may be mentioned that knowledge by the purchaser that the land is in the occupation or tenancy of any one is constructive notice of the terms of such occupation or tenancy, so far as such terms may affect the land (q); also, that knowledge by the purchaser that the tenants in occupation pay their rents to some particular person other than the assuming vendor, is constructive notice of the right or title in such other person, of whatever quality or worth

Notice of occupation or tenancy,—effect of.

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(m) 2 Anstr. 427.

(n) *Whitbread v. Jordan*, 1 Y. & C., Ex. Ca. 303.

(o) *Allan v. Knight*, 5 Hare, 272; *Hewitt v. Loosemore*, 9 Hare, 449; *Spencer v. Clarke*, 9 Ch. Div. 137.

(p) *Worthington v. Morgan*, 16 Sim. 547. But distinguish *Lee v. Clutton*, *supra*.

(q) *Daniels v. Davison*, 16 Ves. 249.



such right or title may prove to be (r),—unless, of course, the usual effect of such notice should be otherwise got rid of.

3. Notice to agent, &c., notice to principal,—when and when not.

There is also a third species of constructive notice, to wit, notice to the agent is constructive notice to his principal; and this is generally so where the same agent is concerned for both vendor and purchaser (s). But the imputation of constructive notice being merely a presumption of fact, arrived at by the court upon the evidence in the case, it is manifest that notice to purchaser's agent might not in fact amount to constructive notice to his principal; *e.g.*, if the agent was designing a fraud, the success of which required that he should not communicate to the principal the notice which he himself had or which he himself received (t). Moreover, notice to counsel, agents, or solicitors, in order to affect in equity their several principals, must have been given or imparted to them in the same transaction; but if one transaction is closely followed by and connected with another, or if it is otherwise clear that a previous transaction must have been present to the mind of the solicitor or counsel when engaged in another transaction, then the second transaction will be considered the same transaction. Thus, in the important case of *Fuller v. Bennett* (u), it appeared that after the commencement of a treaty for the sale of an estate by A., and the purchase of it by B., A. agreed to give C. a mortgage on the estate, as a security for an antecedent debt, and notice of the agreement with C. was given to the solicitors of B., the intending

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(r) *Bailey v. Richardson*, 9 Ha. 734; *Knight v. Bowyer*, 2 De G. & Jo. 421.

(s) *Le Neve v. Le Neve*, 2 L. C.; *Spencer v. Topham*, 2 Jur. N.S. 865; *Saffron Walden Building Society v. Rayner*, 10 Ch. Div. 696.

(t) *Allen v. Lord Southampton, Banfather's claim*, 16 Ch. Div. 178; *Cave v. Cave*, 15 Ch. Div. 639.

(u) 2 Ha. 394. And see Conveyancing Act, 1882, § 3.

purchaser. The treaty for the intended sale by A. to B. afterwards ceased to be prosecuted for five years; and A. then died, and B. purchased the estate from the heir and devisee of A., and conveyed it in mortgage to D. The same solicitors were concerned for B., from the commencement of the treaty with A. until the final purchase of the estate, and for D. in the business of the mortgage. It was held, under the circumstances of the case, that B. and D. had, through their solicitors, constructive notice of the agreement with C.

And further, in order to affect a person with constructive notice of facts within the knowledge of his solicitor, it is necessary not only that the solicitor's knowledge should be derived from the same (or what is practically the same) transaction, but that the knowledge must be so material to that transaction, as to make it the duty of the agent to communicate it to his principal. Thus, in *Wyllie v. Pollen* (v), Lord Westbury, C., said, that the transferee of a first mortgage would not be affected by his solicitor's knowledge of an encumbrance subsequent to the first mortgage, so as to prevent him making further advances, such knowledge not being material to the business of the transfer, for which business the solicitor alone acted. And of course this limit to the rule is only reasonable; in fact, the court very much dislikes this third variety of constructive notice, and the person who relies upon it must prove it very strictly.

5. He who seeks equity must do equity.
6. He who comes into equity must come with clean hands.
7. Equity aids the vigilant, not the indolent; in other words,—Delay defeats equities.

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(v) 32 L. J. (Ch.) N.S. 782; and see *Bradley v. Riches*, 9 Ch. Div. 212; and Conveyancing Act, 1882, § 3.

These three maxims may be viewed as together illustrating the great distinctive and governing principle of equity, that nothing can call forth a court of equity into activity but conscience, good faith, and personal diligence.

5. He who seeks equity must do equity, —illustrations of this maxim:

(a.) Married woman's equity to a settlement.

5. In illustration of the maxim, "He who seeks equity must do equity," may be mentioned the rules which used to govern what is termed the wife's "equity to a settlement." The general rule of the old law was, that when a woman married, all her property (not being settled to, or otherwise belonging to her for, her separate use) passed to her husband; and therefore all her choses in action which he could reduce into possession without the aid of a court of equity, and also all her things in possession, he might realise and take to his own use absolutely; but the moment he was obliged to ask the assistance of a court of equity for that purpose, the court would only aid him on conditions; and the moment the husband came into court, the court told him, "We will help you to get the money on condition that you make a fair settlement out of it for the benefit of your wife and children, and otherwise we will not aid you at all" (*w*).

(b.) Person standing by must give compensation.

Another illustration of the same maxim is, where a person having a title to an estate stands by and knowingly suffers some third person who is ignorant of his title to expend money upon the estate, either in buildings or in other improvements, and then afterwards asserts his title to the estate together with the buildings or improvements. Upon proving his title, judgment would, of course, have been given for him at law, without any compensation for the buildings and improvements executed by the defendant; but in

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(*w*) *Sturgis v. Champneys*, 5 My. & Cr. 105.

equity, and now also in a court of law, such third person would be entitled to be indemnified for his expenditure, either by pecuniary compensation or otherwise; e.g., if he were a lessee under a defective lease, by a confirmation of his title (x).

6. In illustration of the second of the three kindred maxims, viz., "*He who comes into equity must come with clean hands*," may be cited *Overton v. Banister* (y), where an infant, fraudulently concealing his age, obtained from his trustees part of a sum of stock to which he was entitled on coming of age; and when of age, a few months after, applied for and received the residue of such stock, and then afterwards instituted a suit to compel the trustees to pay over again the portion of stock improperly paid during minority; but the court held that the concealment of age was a fraud on the part of the infant, and that neither himself nor his assignees could enforce payment over again by the trustees of the stock paid during the minority (z).

6. He who comes into equity must come with clean hands,—illustration of this maxim.

The rule must be understood to refer, of course, to wilful misconduct in regard only to the matter in litigation, and not to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party in the cause has no concern (a).

7. The doctrine expressed in the third of the three connected maxims, viz., "*Delay defeats equities*," or (as it is otherwise expressed) "*Equity aids the vigilant, not the indolent*," may be briefly summed up in the lan-

7. Delay defeats equities.—illustration of this maxim.

(x) *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Powell v. Thomas*, 6 Ha. 300.

(y) *Hare*, 503.

(z) *Savage v. Foster*, 9 Mod. 35; *Nelson v. Stocker*, 4 De G. & Jo. 458, 464.

(a) Sm. M. 23.

guage of Lord Camden in *Smith v. Clay* (b):—"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence" (c). And it may be added, that even a comparatively short period of delay, not satisfactorily accounted for, also tells heavily against a plaintiff in equity.

8. Equality  
is equity,—  
illustrations of  
this maxim:

8. *Equality is equity*, or equity delighteth in equality. This maxim has a very large application in many branches of equity; but it is perhaps nowhere so clearly illustrated as in the case of joint purchases and joint mortgages. If two persons advance and pay the purchase-money of an estate in equal portions, and take a conveyance to them and their heirs, it constitutes a joint-tenancy at law, that is, a purchase by them jointly of the estate with the chance of survivorship; and, of course, on the death of one the survivor will take the whole estate; and that is the rule not only at law, but also in equity. But wherever circumstances occur which a court of equity can lay hold of to prevent the incident of survivorship, the court will readily do so; for joint-tenancy is not favoured in equity. Thus, in *Lake v. Gibson* (d), it was laid down, that where two or more purchase lands, and advance the purchase-money in unequal shares, and this appears on the deed itself, the mere circumstance of the inequality in the sums respectively advanced makes them in the nature of *partners*; and however the legal estate may survive, yet the survivor will in equity be considered as a

(n.) Purchase-money advanced in unequal shares.

(b) 3 Bro. C. C. 640, note.

(c) *Wright v. Vanderplank*, 2. K. & J. 1, 8. Do. G., M. & G. 133; *Laver v. Fielder*, 32 Beav. 1; *Strange v. Fooks*, 4 Giff. 408.

(d) 1 L. C. 198.

See R.S. 1887 c. 109  
§ 20. Since  
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trustee for the other, in proportion to the sum advanced by him, and of course a trustee also for himself in proportion to his own original share. "Where the parties advance the money *equally*, it may fairly be presumed that they purchased with a view to the benefit of survivorship; but where the money is advanced in *unequal* proportions, and no express intention appears to benefit disproportionately either of them, or especially the one advancing the smaller proportion, it is fair to presume that no such intention existed" (e). So, again, if two persons advance a sum of money, whether in *equal* (b.) Money advanced on mortgage,—in equal or in unequal shares. or in *unequal* shares, by way of mortgage, and take the mortgage to them jointly, and one of them dies, the survivor shall not in equity have the whole money due on the mortgage; but the representative of the deceased mortgagee shall have his proportion as a trust; for the mere circumstance that the transaction is a loan (and not a purchase) is considered by the court to repel the presumption of an intention to hold the mortgage as a joint-tenancy (f), and there could have been no original intention in such a transaction to eventually acquire the land itself.

9. *Equity looks to the intent rather than to the form.*—Although this principle, even before the recent fusion of law and equity, was fully recognised in the common law, yet it was in equity that it received its fullest application. Equity would in no case permit the veil of form to hide the true effect or intention of the transaction,—*non quod dictum sed quod factum inspiciendum est*. Thus it is a well-known rule that equity will in general relieve against a penalty or a forfeiture; e.g., if it is satisfied that the sum of money specified in a bond is penal, it will refuse to enforce payment thereof in full, even though the parties may expressly

9. Equity looks to the intent rather than the form,—illustration of this maxim.

(e) Sugd. V. & P. 697, 1 L. C. 205.

(f) *Rijden v. Vallier*, 2 Ves. Sr. 258; *Morley v. Bird*, 3 Ves. 631.

state in the bond that the specified sum is not by way of penalty, but is to be held as the ascertained or "liquidated damages" for breach of the condition of the bond. To this maxim may be referred also the equitable doctrines that govern mortgages, and nowhere perhaps more than in these was the ancient divergence of equity from common law so strongly and clearly exhibited (g).

10. Equity looks on that as done which ought to have been done, — illustration of this maxim.

10. "*Equity looks on that as done which ought to have been done.*"—The true meaning of this maxim is, that equity will treat the subject-matter of a contract, as to its consequences and incidents, in the same manner as if the act contemplated in the contract of the parties had been completely executed. But equity will not thus act in favour of all persons, but only in favour of a limited class of persons, chiefly purchasers for value, whom equity regards with considerable affection. Thus all agreements are considered as performed, which are made for a valuable consideration, in favour of persons entitled to insist upon their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been done. They are also deemed to have the same consequences attached to them: so that no party to these agreements or his privy shall derive benefit from his own laches or neglect to complete same; and the other party or his privy shall not suffer thereby. And so also money by deed covenanted, or by will directed, to be laid out in land, is treated as already land in equity, from the moment that the deed and will respectively take effect. And, on the other hand, where land is by agreement contracted, or by will directed, to be sold, it is considered and treated as money. This maxim will be fully ex-

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(g) *Peachy v. Duke of Somerset*, 2 L. C. 1100.

emplified under the head of Conversion, hereinafter considered.

11. "*Equity imputes an intention to fulfil an obligation.*"—Where a man is bound to do an act, and he does one which is capable of being considered as done in fulfilment of his obligation, it shall be so construed, because it is right to put the most favourable construction on the acts of others, and to presume that a man intends to be just before he is generous (*h*). Thus if, on his marriage, a husband covenants to pay to the trustees of the marriage settlement the sum of £2000, to be laid out in land in the county of D., and to be settled upon the trusts of the settlement; and if the husband never pays the money to the trustees, but after the marriage he himself purchases land in the specified county, and takes a conveyance thereof to himself in fee, and then dies intestate, without bringing the lands into, or showing any [other] the slightest intention of settling them upon the trusts of, the settlement,—there the purchased lands will be considered as purchased by the husband in pursuance of his covenant, and will be liable to the trusts of the settlement (*i*). Under this maxim the doctrines of satisfaction and performance in equity, and which are both hereinafter considered, find their places.

11. Equity imputes an intention to fulfil an obligation,—illustration of this maxim.

12. "*Equity acts in personam.*" This is a maxim of equity, and which is principally, if not exclusively, descriptive of the procedure in a court of equity, and is not otherwise a maxim or principle of equity itself. The maxim is one of very great importance to the student to understand, and its explanation and illustration may be very useful. In the case of *Penn v. Lord Baltimore* (*j*), which was a suit regarding land in the United States

12. Equity acts in personam,—illustration of this maxim.

(*h*) 2 Sp. 204.

(*i*) *Sowden v. Sowden*, 1 Bro. C. C. 582.

(*j*) 1 Ves. 444; 2 L. C. 837.



(*scil.* beyond the jurisdiction of the English Court of Chancery), Lord Chancellor Hardwicke stated (in effect) as follows:—

“The strict primary decree in this court, as a court of equity, is *in personam*; and although this court cannot (in the case of lands situate without the jurisdiction of the court) issue execution *in rem*, *e.g.*, by *elegit*, still I can enforce the judgement of the court which is *in personam* by process *in personam*, *e.g.*, by attachment of the person when the person is within the jurisdiction, and also by sequestration so far as there are goods or lands of the defendant within the jurisdiction of the court, until the defendant do comply with the order or judgment of the court, which is against himself the defendant personally, to do or cause to be done, or to abstain from doing some act.” And agreeably with the judgment of Lord Hardwicke in this case, the court is in the habit of entertaining actions, and giving judgment therein, for accounts and discovery of rents and profits, and for specific performance and injunction, and for the execution of conveyances, &c., regarding lands situate abroad, and whether within the Queen’s dominions or not. The maxim at present under discussion was also the foundation of the jurisdiction of equity to restrain actions at law (*k*), as will be hereafter more fully explained in the chapter on Injunctions.

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(*k*) *Earl of Oxford’s Case*, 1 Ch. Rep. 1; 2 L. C. 548.

## PART II.

## THE ORIGINALLY EXCLUSIVE

JURISDICTION. *Relative to all such matters from which the common law has no remedy at all.*

## CHAPTER I.

## TRUSTS GENERALLY.

PRIOR to the Statute of Uses, a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee-simple in the lands, and no consideration was necessary for the completeness of the gift at law; and in those days no estate was known excepting only the estate at law. However, about the close of the reign of Edward III., a new species of estate unknown to the common law sprung into existence, and in this wise, namely: The Statutes of Mortmain having prohibited lands from being given for religious purposes, the lawyers (true to their constant habit) hit upon a means of evading them, the device being that of taking grants or making feoffments to third persons *to the use* of the religious houses (a); and in process of time such grants or feoffments to one person to the use of another became usual even where no question of religion entered. In law, the person, and he only, to whom the seisin was delivered, was considered the owner of the land; in equity, however, the Chancellor,

Feoffment,  
with livery of  
seisin.

Uses arise  
temp. Edw.  
III.

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(a) 2 Bl. Com. 328.

Chancellor's  
jurisdiction  
over the  
conscience.

in the exercise of his jurisdiction over the conscience, held that the mere delivery of the possession or seisin to a feoffee was not at all conclusive of the right of the feoffee to enjoy the lands of which he was enfeoffed. Equity was unable, it is true, to take from such feoffee the title which he possessed at law, because equity never sets aside, however much it may avoid, the law ; but equity could and did compel him to make use of his legal title for the benefit of the persons who had the better claim to the benefit thereof. Thus, if A. conveyed land to B. to the use of C., this declaration of the use charged the *conscience* of B., although it did not attach to the *land* itself ; and therefore, if B. refused to account to his *cestui que use* [i.e., he to whose use the property was conveyed, viz., C.] for the profits, this was a breach of confidence on the part of B., for which the common law indeed gave no redress, not recognising C. at all, but only B., as owner of the land (*b*), but for which the Court of Chancery did give C. redress, extorting a disclosure from B. upon his oath of the nature and extent of the confidence reposed in him, and enforcing a strict discharge of the duties of his trust ; and from the period when the right of C. became thus cognisable in the Court of Chancery, C. became in fact the equitable or true and beneficial owner, and B. remained merely the legal owner.

Uses not re-  
cognised at  
common law.

Uses recog-  
nised in equity.

Equity recog-  
nised also the  
rules of law.

Opportunities  
for the abuse  
of the use.

By the introduction of the device of uses, many of the rules and incidents of property were virtually defeated ; *e.g.*, the factious baron might vest his estate at law in friends, and afterwards commit treason with impunity ; and the ordinary proprietor, adopting the same precaution, might enjoy and also dispose of the beneficial interest, regardless of his lord and regardless also of the common law (*c*). But the legitimate advantages arising from the use were notwithstanding

(b) 4 Edw. IV.

(c) Hayes' Intro. 34, 35.

very great; and among the benefits so conferred upon the landowner, the power of disposing of his lands by will, a power properly incident to ownership, was one of the most valuable and important; for while the land itself was not devisable, the use of the land was so; and the legal owner was bound in equity to observe the testamentary destination of the use (*d*).

The inroads which uses had made, and were still making, on the ancient law of tenure, at length induced the Legislature to pass a statute for their regulation, viz, the famous Statute of Uses (*e*). By this statute it was enacted, that where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, the persons that *have* any such use, confidence, or trust (by which were meant the persons beneficially entitled), shall be deemed in lawful seisin and possession of the same lands and hereditaments for such estates as they have the use, trust, or confidence. In other words, the *use* became converted into the *land*; the use by virtue of the statute was the land; and it did not matter for this purpose whether the use was expressed in words, or was merely implied by a court of equity from the circumstances of the case, particularly from the absence of consideration moving from the feoffee. Thus, supposing a feoffment made to A. and his heirs to the use of B. and his heirs, A., who would before the statute have had an estate in fee-simple at law, now takes no permanent estate, but is by virtue of the statute a mere conduit pipe for conveying the legal estate to B.; for B. shall now, having the use, be deemed in *lawful* seisin and possession of the lands—in other words, shall have the land or legal estate, and not merely the beneficial estate. Again, supposing a feoffment made by X. to A. and his heirs simply,

Statute of  
Uses, 27 Hen.  
VIII. c. 10,—  
converted the  
use into the  
legal estate,  
i.e., land at  
law.

1. Express use.

(*d*) Hayes' Intro. 36.

(*e*) 27 Hen. VIII. c. 10.

## 2. Resulting use.

without any expression of the use and without any consideration, X., the feoffor, would in this case, before the statute, have been held in equity to have the use by implication for want of any valuable consideration to pass it to the feoffee; therefore, after the statute, X., the feoffor, having the implied use, shall be deemed in lawful seisin and possession of the land; and consequently, by such a feoffment, although livery of seisin is duly made to A., yet no estate will pass to A.; for the moment A. obtains the estate, he holds it to the implied use of X., the feoffor, and the same moment instantly comes the statute and gives to the feoffor, who has this implied use, the seisin and possession also. The feoffor, X., therefore, instantly gets back all that he gave, and the use is said to *result* to himself (*f*); so much so, that X. is held to be *in* again of his old estate,—the intervening feoffment, with all its heavy formalities, reckoning for nothing.

## The consideration required to rebut a resulting use.

With regard to the question, What is a sufficient consideration moving from the feoffee to the feoffor to prevent the implication of such a resulting use as that lastly before exemplified, it was anciently the rule, even in equity, that any valuable consideration, however trifling, was sufficient to entitle him to retain for his own benefit absolutely the lands of which he was enfeoffed (*g*); but at the present day the court of equity takes a different view, and will not regard as a consideration sufficient for this purpose a merely trifling or nominal consideration, *e.g.*, the customary five shillings' consideration, but will in general in such a case order the grantee, under a voluntary or practically voluntary conveyance, to hold merely as a trustee for the grantor; and at all events, the *onus* is upon the grantee in such a case to prove the intention of a *beneficial* gift to him, failing which

(*f*) 1 Sand. Us. 99, 100.(*g*) 1 Sand. Us. 59, 62.

proof, the grantor will take back the beneficial or equitable estate, although the estate at law may and will continue vested in the grantee (*h*).

The professed object of the Statute of Uses was completely to extirpate the doctrine of uses and trusts; but the statute, so far from effecting that object, rather gave a fresh stimulus to uses and trusts, and in this wise, namely,—the common-law judges determined that if A., the legal owner, was directed to hold the land to the use of B., to the use of C., the statute would carry the land to B. at law, but carry it no further, however plainly the intention might appear that the use or benefit was really designed for C. The ultimate use in favour of C. was “a use upon a use,” *i.e.*, a second use upon or after a first use, which second use the statute, having (in the opinion of the courts of common law) exhausted itself over the first use in favour of B., had no remaining energy to reach (*i*); but equity, considering the plain intention of the gift, held that the use in favour of C. should have full effect in equity, that is, as the equitable estate. Consequently, after the passing of the statute, in order to create an interest purely equitable, nothing more was necessary than to limit a use upon a use, or to declare a second use. Suppose, for example, that A. sold land to B., and B. desired to have the legal estate vested in C., in trust for B., the object was effected by A.’s conveying the land to B. to the use of C., to the use of B. Here the land passes by the conveyance to B. under the old law, and the first use, being that in favour of C., carries the land or legal estate to C. by virtue of the statute; and the second use, being that in favour of B., is the estate in equity or equitable estate (*j*). And in this manner,

Statute of  
Uses,—failure  
of its object.

“No use upon  
a use,”—at  
law;

But such  
second use is  
the trust  
estate,—in  
equity.

(*h*) *Coles v. Trecothick*, 9 Ves. 246.

(*i*) *Lloyd v. Passingham*, 6 B. & C. 305; *Hayes’ Intro.* 53.

(*j*) *Hayes’ Intro.* 53.

under such conveyances, there result two estates, namely, the legal estate or estate at law, which is in the first use in respect of the first use, and the equitable estate or estate in equity, which is in the second (or last) use in respect of the second (or last) use, and which last *use* is for distinction's sake commonly called by the name of *trust* (*k*).

Equity follows the analogy of the law,—as regards equitable estates.

In the construction and regulation of the equitable estate or trust, equity is said to follow the law; that is, the Court of Chancery generally adopts the rules of law applicable to the legal estate. Thus a trust for A. for his life, or for A. and the heirs of his body, or for A. and his heirs, will respectively give A. an equitable estate for life, an equitable estate in tail, or an equitable estate in fee-simple. Again, an equitable estate in fee-simple immediately belongs to every purchaser of freehold property the moment he has signed a contract for its purchase. If, therefore, the purchaser were to die intestate, the moment after a contract is completed as a contract simply, the equitable estate in fee-simple which he had just acquired would descend to his heir-at-law, and the vendor would be a trustee for such heir, and would also be compellable to make a conveyance of the legal estate to the heir (*l*).

Property to which the Statute of Uses is inapplicable.

The Statute of Uses, it will be observed, was pointed at the extirpation of uses of *lands*, *tenements*, and *hereditaments* only, and therefore it extended not to other species of property; and further, the statute spoke, in the case of lands, &c., only of persons "*seised*" of lands, &c., to the use of another or others, and seisin strictly so called applied and applies to freeholds only, and not to leasehold nor to

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(*k*) Wms. R. Prop. 156; 1 Sand. Us. 278.

(*l*) See Wms. R. Prop. 160, 161.

copyhold lands ; and it followed that the statute was confined in its legal operation to freehold lands. Consequently, the properties to which the Statute of Uses does not apply at law are much more numerous than the properties to which it does apply at law, and may be enumerated as follows:—

1. Pure personal property generally.
2. Impure personal property ; otherwise, chattels real ; or leasehold lands ; and
3. Copyhold lands (*m*).

Thus, with regard to all these three classes of properties, if any of them was vested in A. to the use of B., the statute was held not to transfer the legal interest to B., which therefore remained in A. at law, and B.'s use underwent no change except a change of name, for it was now called, in conformity with the style adopted in regard to freehold interests, a *trust* (*n*). And generally, with regard to trusts of all these three classes of property, the rules to be applied after the statute were the same that they were subject to before the statute. And as to freeholds even, only uses of a certain description were operated on by the statute, that is to say, only *passive* uses ; for in regard to *active* uses, being uses which impose (as the name denotes) some active duties on the feoffee, *e.g.*, to sell the land and divide the money, or to pay debts, &c., the statute was necessarily inoperative (*o*).

The Statute of Frauds is the next important statute that has a bearing upon trusts (*p*). Before the statute, trusts of every species of property might have been created, or might have been passed from one person to another, without any writing, and without the use even

Statute of Frauds,—  
trusts originally created by parol, required henceforth in general to be created by writing.

(*m*) 2 Ves. Sr. 257 ; 1 Sand. Us. 249.  
(*o*) *Hayes' Intro.* 51.

(*n*) Gilb. Us. 79.  
(*p*) 29 Car. II. c. 3.



of any particular form of words. But in consequence of the danger of permitting the trust to depend upon so uncertain a thing as memory, and generally to shut the door against the numerous frauds that might otherwise have entered under the pretext of simplicity, the Legislature thought fit to enact that certain species of trusts should be in writing. By the Statute of Frauds it was accordingly enacted as follows:—

Sec. 7. That all *declarations* or *creations* of trusts or confidences of any *lands, tenements, or hereditaments*, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts, or by his last will in writing (q).

Sec. 9. That all *grants* and *assignments* of ANY trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by his last will.

Exceptions.

Sec. 8 recognises two exceptions from the statute, viz.—

(a.) Trusts arising or resulting from any conveyance of lands or tenements, by implication or construction of law (r); and,

(b.) Trusts transferred or extinguished by act or operation of law.

Property to which the Statute of Frauds is applicable.

It is clear that the last-mentioned statute extends to freehold lands; it has been decided that copyhold lands (s), and also leasehold lands or chattels real (t), are likewise within the Act; but that pure personal

(q) *Kronheim v. Johnson*, 7 Ch. Div. 60.

(r) See *Bellasis v. Compton*, 2 Vern. 294; *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

(s) *Lewin Tr.* 43; *Withers v. Withers*, Amb. 151.

(t) *Forster v. Hale*, 3 Va. 696; *Riddle v. Emerson*, 1 Vern. 108.

estate, *i.e.*, chattels personal, are not within the Act (*u*), *scil.* are not within the 7th section (which treats of the declaration or original creation of the trust), but are within the 9th section (which treats of the grant, *i.e.*, the assignment or transfer of an already created and subsisting trust).

A trust, as will be seen from the instances above given, is a beneficial interest in, or a beneficial ownership of, real or personal property unattended with the legal ownership thereof (*v*).

Trusts may be classified under three heads: *express trusts*, *implied trusts*, and *constructive trusts*. Those falling under the first of these three heads may be again subdivided, according to their objects, or their end and purpose, into *express private trusts* and *express public [or charitable] trusts*. Trusts implied and constructive, being the trusts falling under the second and third heads, are frequently confounded, or at least classed together, and it is not always easy to draw the line between them. It is proposed in the succeeding chapters to treat of each head or class of trust in the order above enumerated.

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(*u*) *M'Fadden v. Jenkins*, 1 Ph. 157; *Benbow v. Townsend*, 1 My. & K. 506.

(*v*) 2 Sp. 875.

## CHAPTER II.

## EXPRESS PRIVATE TRUSTS.

**Express trusts.** AN express trust is a trust which is clearly expressed by the author thereof, whether verbally or by writing. Express trusts are of many varieties, which it is proposed to expound in order one after another.

I. *Executed or executory.*

Firstly, An express trust may be either *executed* or *executory*. A trust is said to be executed when no act is necessary to be done to constitute it, the trust being finally declared by the instrument creating it; as where an estate is expressed to be conveyed to A. in trust for B., and the conveyance actually accomplishes what it professes to do. On the other hand, a trust is said to be executory when there is a mere direction to convey upon certain trusts, and the instrument containing the direction to convey does not of itself, *proprio vigore*, constitute the trust or effect the conveyance which it directs. "All trusts," observes Lord St. Leonards, "are in a sense executory, because there is always something to be done. But that is not the sense which a court of equity puts upon the term 'executory trust.' A court of equity, in considering an executory trust as distinguished from an executed trust, distinguishes the two in this manner—Has the testator been what is called, and very properly called, his own conveyancer? Or has he, on the other hand, left it to the court to make out from *general expressions* what his intention is? If he has so defined that in-

tention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates, then the trust is executed ; but, otherwise it is executory " (a).

In the case of trusts executed, a court of equity will put the same construction on technical words as is put by a court of law on limitations of legal estates. If, for instance, an estate is vested in trustees and their heirs in trust for A. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of the body of A., the trust being an executed trust, A., according to the rule in *Shelley's case*, which is a rule of law, will be held to take an estate tail (b) ; and to this rule, it is believed, there is no exception whatsoever. On the other hand, in the case of an executory trust, that is to say, a trust raised either by express stipulation or direction, or by necessary implication, to make a settlement or assurance to uses or upon trusts which are indicated in, but not finally declared by, the instrument containing such stipulation or direction, as in the case of marriage articles, and as in the case of a will where property is vested in trustees to settle or convey in a more perfect and accurate manner, in both which cases a further act—viz., a settlement or a conveyance—is contemplated, then in these and the like cases a court of equity sometimes does, and sometimes does not, put the same construction on technical words as is put by a court of law on limitations of legal estates. It is unnecessary to say that the court of equity in thus acting does not act capriciously or arbitrarily, but pursues with steadfastness certain rules or principles which may be rendered easily intelligible. We shall endeavour to make them

As to trusts executed,—equity follows the law.

As to trusts executory,—equity may or may not follow the law.

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(a) *Egerton v. Brownlow*, 4 H. L. Ca. 210.

(b) *Jervoise v. D. of Northumberland*, 1 J. & W. 559.

so; and, for that purpose, it is to be observed as follows:—

Two guiding principles in executory trusts.

1. In cases of executory trusts, that is, where the trust remains to be executed in the sense of perfect limitation above explained, a court of equity will not invariably construe the technical expressions in the document declaring the trust with legal strictness, but will occasionally execute the trusts, and, if necessary, mould them according to the intention of the creator of the trusts, even if that intention should be contrary to the strict legal effect of the language he has used. But if no such contrary intention can be collected, either from the instrument itself or from the nature of the case, a court of equity is bound to construe, and always does construe, the technical terms used in the instrument in strict accordance with their legal meaning (c).

2. There are two documents (and, it is believed, two documents only) in which executory trusts are found; and these documents are,—firstly, Marriage Articles; and, secondly, Wills.

(a.) Marriage articles, intention always implied.

Now, firstly, in marriage articles, the very object and purpose of these furnish in themselves an indication of intention. Their object is, of course, to make a provision for the issue of the marriage by a properly executed settlement, framed so as to carry out the clauses which the articles only imperfectly express; and it is not to be presumed that the contracting parties meant to put it in the power of either to defeat that purpose by limiting the estate to himself or herself absolutely. If, therefore, the agreement is to limit an estate for life to either or both of the contracting parties, with remainder to the heirs of the body or bodies of him, her, or them, the court decrees a strict settlement

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(c) *Glenorchy v. Bosville*, 1 L. C. 1.

in conformity with the presumable intention. But, (b.) Wills,—secondly, if a will directs the like limitation for life, with the like remainder to the heirs of the body, the court has no such object or purpose necessarily before it as a ground for decreeing a strict settlement; and therefore, in the case of a will, it is not a matter of course, as it is in the case of marriage articles, to decree a strict settlement; and the court therefore does not invariably, but only occasionally, do so. A testator gives arbitrarily what estate he thinks fit; there is no presumption that he means one quantity of interest rather than another—an estate for life rather than in tail or in fee. The testator's intention in respect of the quantity of interest to be given can be known only from the words in which it is expressed to be given; but if it is clearly to be ascertained from the words of the will that the testator did not mean to give that precise quantity of estate which the words of limitation, when construed in strict accordance with the rules of law, would in fact give, then the court will decree such a settlement as the testator appears to have intended, and will depart from his literal words in order to execute that intention (d).

Each branch of the subject must be considered separately from the other—Firstly, therefore, as to executory trusts in marriage articles:—

If in articles before marriage for making a settlement of the real estate of either the intended husband or the intended wife, or of both, it is agreed that the estate shall be settled upon the heirs of the body of them, or either of them, in such terms as would, if construed with legal strictness, according to the rule in *Shelley's case*, give both or either of them an estate

Executory trusts under marriage articles,—  
(a.) Court will decree a strict settlement in conformity with presumed intention.

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(d) *Blackburn v. Stables*, 2 V. & B. 369; *Deerhurst v. St. Albans*, 5 Mad. 260.

tail, and enable both or either of them to defeat the provision for their issue, courts of equity, considering the object of the articles, viz., to make provision for the issue of the marriage, will, in conformity with the presumed intention of the parties, decree a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage in tail as purchasers. Thus, in *Trevor v. Trevor* (e), A., in consideration of a then intended marriage, covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the heirs male of him on her body begotten, and the heirs male of such heirs male issuing, remainder to the right heirs of the said A. for ever:—Lord Macclesfield said that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled when they came to be carried into execution as to make them effectual; and that the intention was to give A. only an estate for life; that if it had been otherwise, the settlement would have been vain and ineffectual, and it would have been in A.'s power as soon as the articles were made to have destroyed them. And his lordship therefore held that A. was entitled to an estate for life only, and that his eldest son took by purchase, as tenant in tail (f).

It is believed that, in the case of marriage articles (not expressly directing to the contrary), there is no instance in which a court of equity has decreed, or will decree, any settlement other than a strict settlement like that decreed in *Trevor v. Trevor*, *supra*.

Secondly,—as to executory trusts in wills—

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(e) 1 P. W. 622.

(f) Affd. in H. of Lds. 5 Brown, P. C. Toml. ed. 122; *Streetfield v. Streetfield*, Ca. t. Talb. 176.

✕ The intention of the testator must appear from the will itself that he meant "heirs of the body," or words of similar legal import, to be words of purchase, and not of limitation; otherwise, courts of equity will direct a settlement to be made according to the strict legal construction of those words. ✕

(b.) Executory trusts in wills, — Court seeks for the expressed intention.

Suppose, for instance, a devise to trustees in trust to convey to A. for life, and after his decease to the heirs of his body; here, as no indication of intention appears that the issue of A. should take as purchasers, the rule of law will prevail, and A. will take an estate tail, although, as we have already seen, in the case of marriage articles similarly worded, he would have taken only an estate for life. Thus, in *Sweetapple v. Bindon* (9), B., by will, gave £300 to her daughter Mary, *to be laid out* by her executrix in lands, *and settled* to the only use of her daughter Mary and her *children*, and if she died without *issue*, the land to be equally divided between her brothers and sisters then living. Lord Cowper said, that had it been an immediate devise of land, Mary the daughter would have been, by the words of the will, tenant in tail; and in the case of a voluntary devise, the court must take it as they found it, and not lessen the estate or benefit of the devisee; and the words *children* and *issue* in the will being used interchangeably, and as so used being equivalent to heirs of the body, the daughter Mary was decreed to have an estate tail under the will.

Construed strictly, in the absence of an expressed intention to the contrary, — *Sweetapple v. Bindon*.

On the other hand, if, for instance, there is a devise to trustees, upon trust to convey to A. for life, and after his decease to the heirs of his body, and in the will there are expressions from which it can be fairly inferred that the testator wanted a strict settlement

Construed according to contrary intention, — if that is expressed, — *Papillon v. Voise*.

(9) 2 Vern. 536. And see the Rule in *Wild's case*, Tud. Conveyancing Cases, 3d ed. 669.



of the lands devised,—for example, either from the will mentioning the testator's desire that A. should marry, or from the testator expressing that A. (notwithstanding the apparent limitations aforesaid) should not have power to bar the entail, or other like words,—then the court of equity will endeavour to effect that intention, and will decree a strict settlement to be for that purpose executed. Thus in the case of *Papillon v. Voice* (h), where A. bequeathed a sum of money to trustees in trust to be laid out in the purchase of lands, to be settled on B. for life, without impeachment of waste, remainder (to trustees and their heirs during the life of B. to preserve contingent remainders, remainder) to the heirs of the body of B., remainder over, *with power to B. to make a jointure*; [and by the same will A. devised lands to B. for his life, without impeachment of waste, remainder (to trustees and their heirs during the life of B. to preserve contingent remainders, remainder) to the heirs of the body of B., remainder over],—Lord Chancellor King declared, as to that part of the case where lands were devised to B. for life, though said to be without impeachment of waste, with remainder (to trustees to preserve contingent remainders, remainder) to the heirs of the body of B.,—this last remainder was in the general rule, and the words of it must operate as words of limitation, and consequently create a vested estate tail in B., and that the breaking into this rule would occasion the utmost uncertainty; but as to the other part, he declared that the court had power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate, and where it was only executory, and the party must come to the court in order to have the benefit of the will; that in the latter case the intention should take place, and not the rules of law; so that as to the

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(h) 2 P. W. 471.

lands to be purchased, they should be limited to B. for life, with power to B. to make a jointure, remainder (to trustees during his life to preserve contingent remainders, remainder) to his first and every other son in tail male successively, remainder over. And the reader will have observed that, in the last-mentioned case, the already acquired lands devised by the will were so devised upon an *executed* trust,—so that the rule in Shelley's case could not but apply; but that, in the same case, the lands *to be purchased*, and then afterwards *to be settled*, devised by the will were so devised upon an *executory* trust,—so that the court was free to apply (or not to apply) the rule in Shelley's case, according as it found (or did not find) in the will itself some reference to a marriage, or some other indication of an intention contrary to the strict construction of the words. Now, the reference to *jointuring* was a reference to marriage, and was also a sufficient reference for the court to act upon. That reference took, in fact, that particular portion of the will out of the category of devises altogether, and put it (in effect) into the category of marriage articles, with the usual consequences as above expounded.

In the following further cases, it was held that there had been a sufficient indication of the testator's intention that the words, "heir of the body," or words of similar import, should be construed as words of purchase, and not of limitation, viz., where trustees were directed to settle an estate upon A. and the heirs of his body, taking special care that it should not be in the power of A. to dock the entail of the estate given to him during his life (i); or, again, "in such manner and form . . . as that if A. should happen to die without leaving lawful issue, the property might then after his

What expressions have been held to show a contrary intention.

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(i) *Leonard v. Sussex*, 2 Vern. 526.

death descend unencumbered to B." (j); so also a direction that the settlement shall be made "as counsel shall advise" has been held to indicate an intention that there should be a strict settlement (k).

II. *Voluntary trusts and trusts for value.*

Secondly,—An express trust may be either a *voluntary trust* or a *trust for valuable consideration*; and for the due understanding of this group of trusts, three general principles have to be considered, namely, the following:—

General rules.

1. *Ex nudo pacto non oritur actio*,—"no action lies upon an agreement without consideration."

1. The maxim, *Ex nudo pacto non oritur actio*, that no action lies upon an agreement without consideration, is as universally recognised in equity as at law. Thus, in *Jefferys v. Jefferys* (l), a father who had by voluntary settlement conveyed certain freeholds, and *covenanted to surrender* [but had never actually surrendered] certain copyholds to trustees in trust for the benefit of his daughters, afterwards devised the same freehold and copyhold estates to his widow, by a will dated subsequently to Preston's Act, 1815 (55 Geo. III., c. 192), being the Act which first rendered a surrender to the uses of the will unnecessary. It followed from this, that the will was completely effective not only as to the freehold lands but also as to the copyhold lands, while the deed of voluntary settlement was completely effective as to the freeholds, but only incompletely effective as to the copyholds. A suit having been instituted by the daughters after the testator's death to have the trusts of the settlement carried into effect, and to compel the widow to surrender to them the copyholds to which she had meanwhile been admitted, the Lord Chancellor said,—“The title of the plaintiffs (the daughters) to the freeholds is complete; and being

(j) *Thompson v. Fisher*, L. R. 10 Eq. 207.

(k) *Bastard v. Proby*, 2 Cox, 6.

(l) Cr. & Ph. 138.

first in date, is also first in right. But with respect to the copyholds, I have no doubt that *the court will not execute a voluntary contract*" (m). Consequently, the widow kept the copyholds, but the daughters got the freeholds.

2. An imperfect conveyance is in equity regarded as evidencing a contract binding or not binding as the case may be (n), that is to say,—(1) An imperfect conveyance, if for valuable consideration, is binding; and (2) an imperfect conveyance, if voluntary, is not binding. And reading these principles backwards, they hold equally true; for (1) a conveyance for value is binding, although imperfect; but (2) a voluntary conveyance is not binding, if imperfect.

2. Imperfect conveyance,—evidence of a contract.

3. On the other hand, a voluntary conveyance may, of course, be perfect; and *if perfect*, it will be *binding*. In other words, a trust may be raised without any consideration. In *Ellison v. Ellison* (o), Lord Eldon says,—“I had no doubt that from the moment of executing the first deed, supposing it not to have been for wife and children, but for pure volunteers, these volunteers might have filed a bill in equity on the ground of their interest under the instrument. . . . I take the distinction to be that if you want the assistance of the court to *constitute* you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of *constituting* you *cestui que trust*” (p), implying that, if you are already completely *constituted*, then you are all right, and may enforce your rights under the deed.

3. Trust may arise without consideration.

It will be found, in fact, that all the cases which have been decided on voluntary trusts, whether in

Has relation of *cestui que trust* been constituted?

(m) *Wilkinson v. Wilkinson*, 4 Jur. N.S. 47.

(n) *Parker v. Taswell*, 4 Jur. N.S. 183; 2 De G. & J. 559.

(o) 1 L. C. 271.

(p) *Jones v. Lock*, L. R. 1 Ch. 25.

favour of or against the volunteers, have turned upon the single inquiry,—Has the trust been completely constituted or declared? Because, if so, it is binding; and if not so, it is no good at all, even as a ground of action for completely constituting it. The inquiry is, however, sometimes one of the greatest nicety, depending on various considerations, which it is now proposed to examine.

I. Where donor is both legal and equitable owner. I. Cases where the donor has the legal as well as the equitable interest in the property, which is the subject of contest.

(a.) Trust actually executed,—either (1) by conveyance or assignment upon trust, or (2) by donor's declaration of trust.

(a.) If the conveyance upon trust for the donee has been actually and effectually made, as if a person by a complete legal conveyance has transferred land or stock, no difficulty will arise, for then equity will enforce the trust even in favour of a volunteer against the author of the trust, and all subsequent volunteers (q). And the rule is the same, not only if the donor has effectually conveyed the property to trustees for the donee, but also where the donor, being legal and equitable owner of property, declares himself a trustee for the donee; a binding trust is thus created. The efficacy of a simple declaration of trust is laid down by Lord Eldon in the case of *ex parte Pye* (r), as follows: "It is clear that this court will not assist a volunteer,—that upon an agreement to transfer stock this court will not interpose. But if the party has declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the court will act upon it."

(b.) Trust not actually executed,—either

(b) It often happens, however, that the donor has not made or intended to make any declaration of trust

(q) *Ellison v. Ellison*, 1 L. C. 273.

(r) *Ex parte Pye, ex parte Dubost*, 18 Ves. 140, 145.

properly so called, but has attempted to make a complete legal conveyance or assignment, and has failed to do so. In considering the legal or equitable effect of such ineffectual attempts, it becomes necessary to draw the following distinctions, viz :—

(1) no declaration of trust, or (2) incomplete conveyance or assignment on trust.

(1.) If the property in such a case is of a species that admits of a complete conveyance or assignment at law, and the conveyance or assignment is left imperfect, the donee will receive no aid from the court to perfect the apparently intended gift.

(1.) Of property assignable at law.

Thus in *Antrobus v. Smith* (s), A. made the following endorsement upon the receipt for one of the subscriptions in the Forth and Clyde Navigation Company:—

*Antrobus v. Smith*,—endorsement under hand only, and purporting to assign.

“I do hereby assign to my daughter B. all my right, title, and interest of and in the enclosed call, and all other calls in the F. and C. Navigation.” Held, that no trust was created in favour of B. The Master of the Rolls said,—“But this instrument was of itself incapable of conveying the property. It is said to amount to a declaration of trust. Mr. Crawford was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. *He was not in form declared a trustee*, nor was that mode of doing what he proposed in his contemplation. He meant a gift. *He says he assigns the property*, but it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift which, in the mode of making it, he has left imperfect. There is a *locus pœnitentiæ*, as long as it is incomplete.”

*(Assignment should have been under seal)*

*Searle v. Law*,  
—non-com-  
pliance with  
the particular  
formalities  
required on an  
assignment.

In *Searle v. Law* (t), A. made a voluntary assignment by deed of turnpike bonds and shares in a railway company, in trust for himself for life, and after his death for his nephew. He delivered the bonds and shares to B., *but did not observe the formalities required by the Turnpike Road Act, and the deeds by which the company was formed to make the assignment effectual.* Held, on his death, that no interest, either in the bonds or in the shares, passed by the assignment, and that B. ought to deliver them to A.'s executors. The Vice-Chancellor said,—“*If that gentleman had not attempted to make any assignment of either the bonds or the shares, but had simply declared in writing that he would hold them on the same trusts as are expressed in the deed, that declaration would have been binding on him, and whatever bound him would have bound his personal representative. But it is evident that he had no intention whatever of being himself a trustee for any one, and that he meant all the persons named in the deed as cestui que trusts to take the provision intended for them through the operation of that deed. He omitted, however, to take the proper steps to make the deed an effectual assignment, and therefore both the legal and the beneficial interest in the bonds and shares remained vested in him at his death.*”

(2.) Of property  
not assignable  
at law.

(2.) But if the property conveyed or assigned be not such that it may properly be transferred at law, the conveyance or assignment of it will be held good if the donor has done all that he could to perfect the assignment; but if he has left anything imperfect which he might have perfected or made more nearly perfect, the conveyance or assignment will be bad.

*Fortescue v. Barnett*.—  
policy of as-

Thus in *Fortescue v. Barnett* (u), J. B. made a voluntary assignment by deed of a policy of assurance upon

(t) 15 Sim. 95.

(u) 3 My. & K. 36.

his own life for £1000 to trustees upon trust, for the benefit of his sister and her children if she or they should outlive him. The deed was delivered to one of the trustees, but the grantor kept the policy in his own possession. No notice of the assignment was given to the assurance office, and J. B. afterwards surrendered, for valuable consideration, the policy and a bonus declared upon it, to the assurance office. Upon a bill filed by the surviving trustee of the deed to have the value of the policy replaced, the court held that, upon the delivery of the deed, no act remained to be done by the assignor to give effect to the assignment of the policy, and that he was bound to give security to the amount of the value of the policy assigned by the deed. The Master of the Rolls said,—“In the present case, the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant, if the trustees had given notice of the assignment to the assurance office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor, which to assist a volunteer this court would not compel him to do. *I am of opinion, that no act remained to be done to complete the title of the trustees.*”

On the other hand, in *Edwards v. Jones (v)*, the obligee of a bond, five days before her death, signed a memorandum *not under seal*, which was endorsed upon the bond, and which purported to be an assignment of the bond without consideration to a person to whom the bond was at the same time delivered. *Held*, that the gift was incomplete, and that the court could not give effect to it. The Lord Chancellor said,—“The

*Edwards v. Jones*,—bond purporting to be assigned by memorandum under hand only.



transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, the question comes to be, whether the mere handing over of the bond . . . would constitute a good gift *inter vivos*; that is to say, whether the plaintiff would be entitled to the assistance of a court of equity for the purpose of carrying into effect the intention of the parties. Now, it is clear that this is a purely voluntary gift, and a gift which cannot be made effectual without the interposition of this court" (*w*).

*Pearson v. Amicable Society*,—policy of assurance, purported assignment of, by deed.

The cases on this subject are in no sense conflicting, provided the distinctions taken above are borne in mind. The rules regulating the matter have been clearly enunciated and applied in the case of *Pearson v. Amicable Assurance Office* (*x*). There G. T. effected a policy of assurance on his life with the Amicable Society, and then executed a voluntary settlement of the policy, assigning the policy to trustees to hold on the trusts of the voluntary settlement, and then died, and the trustees claimed the amount from the company, and the executors of G. T. gave notice to the office not to pay the amount to the trustees, whereupon the company paid the money into court. The Master of the Rolls said,—“The question is, whether this is a complete instrument, or whether it requires the assistance of a court of equity for its enforcement. I am of opinion that it is a complete and perfect instrument.”

Assignment of policies, and legal choses in action.

It may here be observed that certain classes of property, not formerly assignable at law, have since the date of the foregoing decisions been made assignable at law (*y*); consequently, the distinction aforesaid be-

(*w*) *Blakely v. Brady*, 2 Dr. & Walsh, 311, and distinguish *Baddeley v. Baddeley*, 9 Ch. Div. 113.

(*x*) 27 Beav. 229.

(*y*) Policies of life assurance are assignable under 30 & 31 Vict., c. 144; policies of marine insurance under 31 & 32 Vict., c. 86; and debts and other legal choses in action generally under 36 & 37 Vict., c. 66, s. 25, sub-sec. 6.

tween property that is, and property that is not, properly assignable at law, is for the future rendered unnecessary, and the question in all cases now is simply whether the property has been in fact completely assigned at law or only incompletely assigned at law; but the principle of the decisions is not in the slightest degree altered.

*A.B.* Before leaving this branch of the subject, it may be mentioned that in the recent case of *Fox v. Hanks* (2), where a husband executed a deed of assignment of a leasehold house in favour of his wife for her separate use, without the intervention of trustees for the wife, the court held that the assignment was good as a declaration of trust, that being the only mode in which the deed as between the husband and wife (who were the only parties to it) could operate.

*A.B.*

II. Cases where the donor has only an equitable interest in the property assigned.

II. Where donor is only equitable owner.

(a.) In this case, if the settlor directs trustees to hold the property in trust for the donee, though without consideration, a trust is well and irrevocably created (a). Such a direction must be in writing as regards lands, whether freeholds, leaseholds, or copyholds; but a direction by parol is sufficient to create a trust as regards pure personal property (b). Moreover, it is not necessary for the validity of a trust thus created that there should be notice to, or an acceptance or declaration of the trusts by, the trustees, in whom the legal interest is vested (c), such notice being only necessary to protect the *cestui que trust* as against third

(a.) Trust actually executed, — either (1) by direction to trustees to hold on trust;

(2) 13 Ch. Div. 822; and see *Baddeley v. Baddeley*, 9 Ch. Div. 113; and the Conveyancing Act 1881.

(a) *Bill v. Cureton*, 2 My. & K. 503.

(b) *M'Padden v. Jenkins*, 1 Ph. 153.

(c) *Tierney v. Wood*, 19 Beav. 330; *Donaldson v. Donaldson*, Kay, 711; *Kronheim v. Johnson*, 7 Ch. Div. 60.

parties (d). It has even been said that a trust of pure personal estate may be validly created by the mere conduct of the party, without any express direction, *scil.* where from his conduct such a direction may be implied (e).

Or (2) by conveyance or assignment of equitable interest.

(b.) Secondly, Instead of giving directions to the trustees to hold for the benefit of the volunteer, the donor may convey or assign his equitable interest to another; and in that case there are two groups of cases to consider, namely—

- (1.) Lands,—conveyance of equitable interest in;  
and
- (2.) Personalty,—assignment of equitable interest in.

*Gilbert v. Overton*,—lands, conveyance of equitable interest in, by deed.

(1.) Lands,—conveyance of equitable interest in:—

In *Gilbert v. Overton* (f), a settlor, holding an agreement for a lease, subject to rents and covenants, by voluntary deed assigned all his interest to trustees, to hold upon the trusts thereby declared; shortly afterwards he took a lease under the agreement to himself, but never assigned to the trustees the legal estate which he so acquired; and it did not appear whether at the date of the settlement the settlor was entitled to call for an immediate lease. The court held that the settlement was complete, and ought to be carried into execution. In giving judgment, Lord Hatherley, then Vice-Chancellor, said,—“The settlor conveys his equitable interest, and directs the trustees to hold it upon the trusts thereby declared. In the inception of the transaction, *there is nothing to show that the settlor had the power of obtaining a lease before the time when he did so*, after the execution of the settlement. There is, therefore, nothing to show that

(d) *Donaldson v. Donaldson*, Kay, 719.

(e) *Penfold v. Mould*, L. R. 4 Eq. 562; and see *Fox v. Hanks*, *supra*.

(f) 2 H. & M. 110.

the settlor did not, by the settlement, do *all that it was then in his power to do* to pass the property. If this were not sufficient, it would be impossible to make a voluntary settlement of property of this description " (g).

(2.) Personalty,—assignment of equitable interest in :—

In *Kekewich v. Manning* (h), residuary estate, consisting of money in the funds, was bequeathed to a mother and her daughter, in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of her marriage, the daughter assigned her interest under the will to trustees upon trust for the issue of the intended marriage, and in default of such issue, then for a niece of the daughter and the issue of the niece. The daughter's husband died soon after the marriage, of which there was no issue. *Held*, that [even if the settlement was voluntary as regarded the trust in favour of the niece] it was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement, against the daughter, and against the trustees of another settlement, which she had made on a second marriage, inconsistent with the former settlement. Knight Bruce, L.J., said,—“To state, however, a simple case—suppose stock or money to be legally vested in A. as a trustee for B, for life, and subject to B's life-interest, for C. absolutely; surely it must be competent to C. in B's lifetime, with or without the consent of A., to make an effectual gift of C's interest to D., by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. If so, can C. do this better or more effectually than by executing an assignment to D.?”

(g) But see *Bridge v. Bridge*, 16 Beav. 322.

(h) 1 De G. M. & G. 176; and see *Meek v. Ketilwell*, 1 Ha. 464.

*Donaldson v. Donaldson*,—  
to same  
effect.

In *Donaldson v. Donaldson* (i), it was held, that a voluntary assignment of the assignor's interest in a sum of stock standing in the names of trustees, such assignment being made by deed of trust in favour of volunteers, was a complete transfer of such interest, as between the donee and the representative of the donor, and this although no notice of the deed was given to the trustees in the donor's lifetime. Wood, V.C., said,—“The question is, in every case where there has been no declaration of trust, Has the assignor performed such acts that the donee can take advantage of them, without requiring any further act to be done by the assignor, and if the title is so far complete, this court will assist the donee in obtaining the property from any person who would be treated as a trustee for him? . . . In this case there is no need whatever for the donee to call in aid the jurisdiction of this court against the original assignor or his representatives. All that they have to do is to require the trustees who hold the fund, to transfer it to them”(j).

*Milroy v. Lord*,—sum-  
mary of the  
law.

The law as to voluntary trusts is thus summarised by Lord Justice Turner in *Milroy v. Lord* (k): “In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust

(i) Kay, 711.

(j) See also *Re Way's Settlement*, 13 W. R. 149; *Paul v. Paul*, 19 Ch. Div. 47, dissenting from same case as reported in 15 Ch. Div. 580.

(k) 4 De G. F. & J. 264; and see *In re King*, *Sewell v. King*, 14 Ch. Div. 179.

for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol.

(b.) "But in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to *perfect an imperfect gift*;" and it may be added, that where the facts show an intention to transfer property, and not to declare a trust, the court will not give effect to an imperfect transfer by treating it as a declaration of trust (1).

(b.) Trust not actually executed, — either (1) by direction to trustees, or (2) by conveyance or assignment of equitable interest.

Thirdly, A conveyance upon trust may (or may not) be fraudulent, and ineffectual (or effectual) accordingly. Further, various species of frauds, arising either at common law or under the provisions of particular statutes, have to be considered, and principally in connection with marriage settlements, in order to determine whether the settlement (being otherwise good and perfect) is to stand or fall. We propose to indicate the principal provisions of the statutes.

III. *Fraudulent trusts*, — principally in relation to marriage.

(a.) By the statute 13 Eliz., c. 5, all covinous conveyances, gifts, alienations of lands or goods, whereby *creditors* might be in any wise disturbed, hindered, delayed, or defrauded of their just rights, are declared *utterly void*, but the Act is not to extend to any estate or interest in lands, &c., *on good consideration* and *bona fide* conveyed to any person not having notice of such covin.

(a.) 13 Eliz., c. 5, — frauds under. See *R.S.O. 1867* c. 96, s. 3

This statute does not declare voluntary conveyances to be void, but only fraudulent conveyances to be void

Settlement must be both on good con-

(1) *Milroy v. Lord*, 4 De G. F. & J. 264; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Richards v. Delbridge*, 22 W. R. 584; *Breton v. Woolven*, 17 Ch. Div. 416.

sideration and *(m)*; and whether a conveyance be fraudulent or not *bond fide*. is declared to depend upon its being made upon good consideration AND *bond fide*; and if a conveyance be defective in either particular, although it is valid between the parties and their representatives, yet it is utterly void if it tend to defeat or delay the creditors *(n)*.

Settlor being indebted does not per se invalidate conveyance.

Doctrine in *Spirett v. Willows* stated.

It was for some time thought that the mere fact of the settlor being indebted at the time of the conveyance, if the conveyance was voluntary, was sufficient to invalidate that conveyance under the statute in favour of creditors; and certain dicta of Lord Westbury in *Spirett v. Willows (o)*, were supposed to support that view. It was there said, "that if the debt of the creditor by whom the voluntary conveyance is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." His Lordship meant, of course, that, having shown so much, you had shown enough, and it was not necessary to go on and show further that the settlor was also insolvent; but his Lordship did not intend to say, that the voluntary conveyance might not have been supported by proof of the settlor's solvency; for it seldom happens that a man is not indebted to some extent when he makes a voluntary settlement, but then he is usually able, both after the settlement and before it, to pay all his creditors without difficulty; and it is only when the creditors are delayed seriously by the settlement in getting paid their debts that the settlement is made void under the statute as against them.

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(m) *Holloway v. Millard*, 1 Mad. 414.

(n) St. 353; *Middleton v. Pollock*, *Ex parte Elliott*, L. R. 2 Ch. Div. 104.

(o) 3 De G. J. & S. 293; 34 L. J. Ch. 367.

The principle laid down in *Spirett v. Willows* has been reconsidered and approved, and also extended, in the recent case of *Freeman v. Pope* (p). The bill there was filed for the administration of the estate of A., and to set aside a voluntary settlement executed by him some years previous to his death, *by a creditor whose claim had accrued since the date of the settlement*. It was proved that A. was perfectly solvent up to the date of the settlement, but that *the effect of the settlement was to deprive him of the means of paying certain then existing debts*. Lord Hatherley, in deciding against the validity of the settlement, after reviewing the authorities, stated the law to be, that in the absence of direct proof of intention to defraud, if a person owing debts made a settlement which subtracted from the property which was the proper fund for payment of those debts, an amount without which *the then existing debts* could not be paid, then the law would presume an intention to defeat and delay creditors, such as to bring the case within the statute. In other words, *the subsequent creditors*, upon showing in effect that the money lent by them must have been applied towards paying the former creditors who were in existence at the date of the settlement, but had subsequently been paid off, were decided to have an equity to "stand in the shoes" of the previously existing creditors, for the purpose of impeaching the settlement.

*Freeman v. Pope*,—extension of decision in *Spirett v. Willows*.

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The question as to what amount of indebtedness will raise the presumption of fraudulent intent, within the meaning of the statute 13 Eliz., c. 5, is one of evidence to be decided upon the facts of each case. Mere indebtedness will not suffice, nor, on the other hand, is it necessary to prove absolute insolvency. To quote the words of Lord Hatherley, when Vice-Chan-

What amount of indebtedness will raise presumption of fraudulent intent, within the meaning of 13 Eliz., c. 5.

(p) L. R. 5 Ch. 538; and see *Taylor v. Carnen*, L. R. 1 Ch. Div. 636; *Mackay v. Douglas*, L. R. 14 Eq. 106; *Ex parte Russell*, in re *Butterworth*, 19 Ch. Div. 588; and distinguishing *Golden v. Gillam*, 20 Ch. D. 389.



cellor, in *Holmes v. Penney* (q),—"The settlor must have been at the time not necessarily insolvent, but so largely indebted as to induce the court to believe that the intention of the settlement, taking the whole transaction together, was to defraud the persons who at the time of making the settlement were creditors of the settlor" (r). In other words, the settlor must either have been already insolvent, *i.e.*, embarrassed, at the date of the settlement, or must have become immediately embarrassed in consequence thereof.

(b.) 27 Eliz.,  
c. 4,—frauds  
under.

See R.S. 1567  
c. 46 §. 1

*no voluntary conveyances & Executions  
Good faith and  
duly registered to  
be completely free  
the absence of  
valuable consid-  
eration*

(b.) The statute 27 Eliz., c. 4, was enacted for the protection of *purchasers*, as the statute 13 Eliz., c. 5, was for that of creditors. It enacts that every conveyance, grant, charge, lease, limitation of use, of, in, or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, &c., as shall purchase the said lands, or any rent or profit out of the same, shall be deemed, but only as against such persons, their heirs, &c., who shall so purchase for money or any good consideration the said lands, &c., to be *wholly void*, frustrate, and of none effect. *... by Act now*

Voluntary  
settlement  
void against  
subsequent  
purchaser.

A voluntary settlement of lands, whether freehold, copyhold, or leasehold, made in consideration only of natural love and affection or for no consideration, is void as against a subsequent purchaser of the same lands for valuable consideration, even though with notice (s), for the very execution of a subsequent conveyance of the same lands sufficiently evinces the fraudulent intent of the former one. The meritorious or voluntary settlement is, however, good as against the

(q) 3 K. & J. 90; *Townsend v. Westacott*, 2 Beav. 340.

(r) See St. 362-365, where the English and the American decisions on this point are fully reviewed and compared. See also May on Voluntary Conveyances, 41-47.

(s) *Doe v. Manning*, 9 East, 59.

grantor (t), who therefore cannot compel specific performance of a subsequent contract for the sale of the lands so settled (u), though the purchaser from him can (v).

Chattels personal, in which respect they differ from leaseholds or chattels real, are not within the statute 27 Eliz. c. 4; and, therefore, a voluntary settlement of chattels personal cannot be defeated under the statute by a subsequent sale (w). And even as regards chattels real, i.e., leasehold properties, the recent decisions tend to this result, that if the volunteer undertakes to observe the covenants comprised in the lease, and such covenants are of an onerous character, then ~~he is not in fact a volunteer (x).~~

Chattels personal not within the statute.

A mortgagee (y), and likewise a lessee, is a purchaser within the meaning of the statute; but a judgment creditor is not so (z).

Purchaser—who.

It has been decided that a *bonâ fide* purchaser for value from the heir-at-law or from the devisee of the voluntary settlor is not within the statute; also, that a *bonâ fide* purchaser for value from one claiming under a second voluntary conveyance, or in fact from any other than the voluntary settlor himself, is equally excluded from the benefit of the statute (a).

Subsequent purchase must be from the very settlor himself.

(t) See *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

(u) *Smith v. Garland*, 2 Mer. 123.

(v) *Daking v. Whimper*, 26 Beav. 568.

(w) *Bill v. Cureton*, 2 My. & K. 503; *M'Donnell v. Hesilrige*, 16 Beav. 346.

(x) *Saunders v. Dehew*, 2 Vern. 272; *Price v. Jenkins*, L. R. 4 Ch. Div. 483; *Gale v. Gale*, L. R. 6 Ch. Div. 144. See also *Ex parte Doble*, in re *Doble*, 26 W. R. 407; *Ex parte Hillman*, in re *Pumfrey*, 10 Ch. Div. 622.

(y) *Chapman v. Emery*, Cowp. 279; *Cracknall v. Janson*, 11 Ch. Div. 1.

(z) *Beavan v. Earl of Oxford*, 6 De G. M. & G. 507.

(a) *Doe v. Rusham*, 17 Q. B. 723; *Lewis v. Rees*, 3 K. & J. 132; *Richards v. Lewis*, 11 C. B. 1035; *General Meat Supply Association v. Bouffler*, W. N. 1879, 26.

When the voluntary settlement is set aside under the statute 27 Eliz. c. 4, in favour of the subsequent purchaser, the volunteers have no right to the specific purchase-money (b); but if the settlement contained a covenant for quiet enjoyment, the settlor would be liable thereon for damages amounting (in effect) to the amount of the specific purchase-money (c).

*Bond fide* purchasers, definition of.

*Bond fide* purchasers are such as take *bond fide*, and for a valuable consideration. And this leads us to the inquiry, What is a valuable consideration under this statute? Lawful considerations generally may be divided into two classes:—

Considerations are either,—  
(1.) Meritorious;

1. Meritorious considerations (sometimes called *good* considerations) are considerations of blood or natural affection; or merely considerations of generosity, prudence, and natural or moral duty, without anything in them which the law considers valuable; and of course such considerations standing alone will not under the statute support a conveyance as against a subsequent purchaser for value.

Or (2.)  
Valuable.

2. Valuable considerations are *money, marriage, or the like*, which the law esteems an equivalent for money.

Marriage consideration under 27 Eliz. c. 4.

The consideration of marriage has always been recognised by courts of law and equity as a valuable one; and previous to the Statute of Frauds a mere promise by the intended husband to settle property upon the intended wife was upheld by the subsequent marriage. The Statute of Frauds, 29 Car. II., c. 3, s. 4, did not change the principle, but only required an additional circumstance by way of evidence,—that

(b) *Daking v. Whimper*, 26 Beav. 568.

(c) *Dolphin v. Aylward*, L. R. 4 H. L. 486.

such ante-nuptial agreement should be in writing, in order that it should bind the husband, or other the party signing it. In the case, therefore, of an ante-nuptial *written* agreement *followed by the marriage*, the wife becomes a purchaser within the statute 27 Eliz., c. 4 (d); and it may even be that an ante-nuptial *parol* agreement, subsequently embodied in a post-nuptial settlement, made in pursuance of the agreement, may be good as against a subsequent purchaser for value, although without notice under the 27 Eliz., c. 4 (e), it being sufficient if the written evidence is forthcoming before action brought; but a mere post-nuptial voluntary settlement, without any ante-nuptial agreement, is void under that statute as against a subsequent purchaser for value, even with notice (f).

Post-nuptial settlement in pursuance of ante-nuptial parol agreement.

But though a post-nuptial voluntary settlement made by the husband or wife, and not in pursuance of any ante-nuptial agreement, is within the provisions of the 27 Eliz., c. 4, and void against a subsequent purchaser, still a court of equity is willing to support post-nuptial settlements on very slight consideration. Thus, in *Hewison v. Negus* (g), it was decided that if the wife's real estate, of which her husband would be entitled to receive the rents and profits during her coverture, was settled by post-nuptial settlement on her for life, for *her separate use*, &c., with remainder to the children, the post-nuptial settlement was not void under the 27 Eliz., c. 4, as against a subsequent purchaser from the husband and wife, but that the interests

*Bona fide* post-nuptial settlement supported on slight consideration.

(d) *Kirk v. Clark*, Prec. in Ch. 275.

(e) *Dundas v. Dutens*, 2 Cox, 235; *Spurgen v. Collier*, 1 Eden. 55; *Warden v. Jones*, 2 De G. & Jo. 76; and see the principle in *Bailey v. Sweeney*, 9 C. B., N.S., 843; 30 L. J. C.P. 150; and disting. *Trowell v. Shenton*, 8 Ch. Div. 318.

(f) *Butterfield v. Heath*, 15 Beav. 408; *Warden v. Jones*, 2 De G. & Jo. 76.

(g) 16 Beav. 594; and see *Bayspoole v. Collins*, L. R. 6 Ch. app. 228; *Tensdale v. Braithwaite*, L. R. 4 Ch. Div. 85, and 5 Ch. Div. 630; *In re Foster & Lister*, L. R. 6 Ch. Div. 87.

of the children under the settlement held good. "I concur," said the Master of the Rolls, "with the argument which was urged, that the surrender by the husband of his right to receive the rents and profits of the hereditaments during coverture, and his giving his wife a sole and exclusive power and control over them, is a valuable consideration sufficient to support this settlement." The husband in this case was a purchaser on behalf of his children, *scil.* he gave up his own life estate in consideration of the estates limited to his children. And, *semble*, a *bonâ fide* post-nuptial settlement of leasehold properties, subject to onerous covenants which the *cestuis que trustent* under the settlement undertake to observe, is not a voluntary settlement (*h*).

*Mala fide* pre-nuptial settlement not supported.

And conversely, even an ante-nuptial voluntary settlement, for which the marriage is the sole consideration on the part of the wife, will not be supported as against a subsequent purchaser, if the marriage is in effect no consideration emanating from the wife. Thus, in *Colombine v. Penhall* (*i*), a gentleman went through a valid ceremony of marriage with a female who had previously lived with him in concubinage for a period of years; and he settled considerable property upon her prior to and in purported consideration of the marriage. The court was, however, of opinion that the marriage in this case was wholly illusory *as a consideration*, and that the female was aware of the real character of the transaction; and accordingly, it set aside the settlement as fraudulent against a subsequent purchaser.

(c.) A very factitious and artificial species of fraud

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(*h*) *Ex parte Doble, in re Doble*, 26 W. R. 407, affirmed and explained in *Ex parte Hillman, in re Pumfrey*, 10 Ch. Div. 622.

(*i*) 1 Sm. & Giff. 228; see also *Bulmer v. Hunter*, L. R., 8 Eq. 46.

was introduced for the protection of creditors in certain cases by the Bills of Sale Act, 1854, which was amended by the Bills of Sale Act, 1866 (*j*); but both these Acts have been recently repealed by the Bills of Sale Act, 1878 (*k*), which contains, however, similar provisions with some important variations; and as from the 1st day of November, 1882, still further variations have been made by the Bills of Sale Act, 1882 (*k*). Under the Bills of Sale Act, 1878 (*k*), it has been enacted in effect as follows:—That every bill of sale of personal chattels made on or after the 1st January 1879, whereby (whether the same be absolute or conditional, or subject or not subject to any trust) the grantee or holder thereof shall have power (either with notice or without notice, and either as from or at any future time after the execution of the bill of sale) to seize or take possession of any personal chattels comprised in or subject to such bill, shall be, as against the trustee in bankruptcy, general assignees, and execution creditors of the grantor (*l*), void to all intents and purposes, to the extent of the personal chattels therein comprised, which are and remain in the possession or apparent possession of the grantor, at or after the date of the bankruptcy, general assignment, or execution (as the case may be), and after seven days from the date of the bill of sale, unless the following requisites of the Act have been complied with, viz.—

(c.) The Bills of Sale Act, 1878, 41 & 42 Vict., c. 31, and 1882, 45 & 46 Vict., c. 43.—frauds under.

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1. The bill of sale (including the schedule thereto, if any), or a true copy thereof, is to be filed with the docquets or judgments clerk in the Queen's Bench Division (now at the Central Office) within seven days from the execution of the bill of sale; and, under the Act of 1882, there must now be such a schedule in all cases, except as against the grantor of the bill.

(*j*) 17 & 18 Vict., c. 36; 29 & 30 Vict., c. 96.

(*k*) 41 & 42 Vict., c. 31; and 45 & 46 Vict., c. 43.

(*l*) *Davis v. Goodman*, 5 C. P. Div. 128.

## 2. An affidavit stating—

- (a.) The time of making the bill of sale, and the due execution thereof, and that its effect was fully explained to the grantor by a solicitor;
- (b.) The residence and occupation of the maker thereof; and
- (c.) The residences and occupations of the witnesses attesting the bill, one of whom must be a solicitor,

is at the same time with filing the bill of sale (*m*), and within seven days from the execution thereof, to be filed in like manner as the bill of sale itself; but, under the Act of 1882, the solicitor's attestation or explanation is no longer necessary.

Also, the consideration for which the bill of sale is given must be truly stated therein (*n*); and if it is not, the bill of sale is expressly made void by the Act of 1882, as it also is if the consideration given is less than £30, or if the bill is not made in accordance with the form in the schedule to the Act.

And every such bill of sale as aforesaid is to be re-registered every five years.

And it is a new provision in the Act of 1878, s. 10, that a bill of sale duly registered now takes precedence of an unregistered bill of sale (*o*); and the Act of 1882, s. 8, makes an unregistered bill of sale void for all purposes.

By the interpretation clause of the principal Act,

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(*m*) *Grindell v. Brendon*, 6 C. B., N.S. 698.

(*n*) *Ex parte Firth, in re Couburn*, 19 Ch. Div. 419; *Ex parte Nicholson*, 44 L. T. (N.S.) 828; *Ex parte Rolph*, 19 Ch. Div. 98; *Hamilton v. Chaine*, 7 Q. B. D. 1, 319; and *disting. Ex parte National Mercantile Bank*, 15 Ch. Div. 42; *Ex parte Challinor*, 16 Ch. Div. 260.

(*o*) *Conelly v. Steer*, 7 Q. B. D. 520; *Lyons v. Tucker*, 7 Q. B. D. 523.

a bill of sale is extended to include assignments and all other assurances of personal chattels (including fixtures), and also licences or other authorities (including attornments and agreements under which any right arises) to take possession of such personal chattels as security for a debt; but possession is not now to be taken unless for one of the causes specified in sec. 7 of the Act of 1882; and after possession is so taken, the personal chattels are not to be removed or sold until five clear days have expired.

The Act of 1878, like the Bills of Sale Acts, 1854 and 1866, expressly exempts marriage settlements from their operation; but this exemption extends only to ante-nuptial and not also to post-nuptial settlements (p). By the 20th section of the principal Act it was expressly provided, that the chattels comprised in a bill of sale which had been and continued to be duly registered under the Act, should not be deemed to be in the possession, order, or disposition of the grantor of the bill within the meaning of the Bankruptcy Act, 1869; but this provision is repealed by the 15th section of the Act of 1882; but the last-mentioned Act does not apparently extend to any bills of sale unless the same are given by way of security for money lent.

(d.) By the Bankruptcy Act, 1869, s. 91 (g), the following provisions have been made, but with reference only to post-nuptial settlements, and in the case of these even, only when made by traders; that is to say—

(d.) The Bankruptcy Act, 1869, s. 91.—frauds under.

I. With reference to the husband's property in his own right,—(1.) Any post-nuptial settlement made within two years of the subsequent bankruptcy of the

(p) *Ashton v. Blackshaw*, L. R. 9 Eq. 510. See also Brown's Law Dictionary, title *Fraudulent Conveyances*.

(g) 32 & 33 Vict., c. 71.



settlor is, *ipso facto*, void upon the bankruptcy (*scil.* as against the trustee in the bankruptcy); and—(2.) Any post-nuptial settlement made within ten years of the subsequent bankruptcy of the settlor, and outside the first two of such ten years, is also void upon the bankruptcy (*scil.* as against the trustee in the bankruptcy), unless and until the settlor proves that the same was not in fact fraudulent as against his creditors.

II. With reference to the husband's property in right of his wife,—Any post-nuptial settlement on the wife and children of the settlor is good (no matter how soon the bankruptcy of the settlor may come about), provided it be of property that has accrued to him through his wife during the coverture.

Also by the same Act and the same section thereof, it is provided that all ante-nuptial covenants and contracts by a trader to settle property yet to be acquired, shall be void upon the trader's subsequent bankruptcy, unless prior to such bankruptcy the property referred to has been both acquired, and also in fact settled pursuant to the covenant or contract (r).

Who are within the scope of the marriage consideration.

There have been some cases in which the question has been, how far the consideration of marriage will extend, and whether limitations in favour of very remote objects may not be void as against subsequent purchasers. A limitation to the issue of the settlor by a second marriage has been held *not* to be voluntary (s). So a settlement on her marriage, made by a woman of her property, as a provision for her illegitimate child, has been upheld as against a subsequent

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(r) *Ex parte Bishop, in re Tonnies*, L. R. 8 Ch. App. 718. See Brown's Law Dictionary, title *Fraudulent Conveyances*.

(s) *Clayton v. E. of Winton*, 3 Mad. 302 n.; *Newstead v. Searles*, 1 Atk. 265.

mortgagees (t). But a limitation to the brothers of the settlor or to more distant collaterals is voluntary as a general rule (u), they not being damnified, i.e., "dam-nously affected," by the marriage.

But limitations in favour of collaterals will be supported if there be any party to the settlement who purchases on their behalf (v).

Fourthly, Conveyances upon trust may be upon trust for creditors. And to the general rule that a declaration of trust in favour of volunteers by the legal or equitable owner of realty or of personalty is irrevocable, there is an important exception in the class of cases where a debtor, without the knowledge of his creditors, makes a transfer of property to trustees for payment of his debts. Such a transaction does not invest creditors with the character of *cestui que trusts*, but amounts merely to a direction to the trustees as to the mode in which they are to apply the property vested in them, for the benefit of the owner of the property, the debtor, who alone stands to them in the relation of *cestui que trust*, and who can vary or revoke the trusts at pleasure (w). Thus in *Walwyn v. Coutts* (x), where a father conveyed his estates to trustees for paying off annuities granted by his son, together with the arrears, and also his son's debts, if they thought proper; and the annuitants were mentioned in a schedule, but were neither parties nor privies to the deed; and the father and son afterwards executed other deeds varying the former trusts, upon a motion by one of the scheduled

IV. Trusts in favour of creditors,—revocable, as a general rule.

Amounts to a mere direction to trustees as to mode of disposition.

(t) *Clark v. Wright*, 6 H. & N. 849; see *Price v. Jenkins*, L. R. 4 Ch. Div. 483; *Gale v. Gale*, L. R. 6 Ch. Div. 144.

(u) *Johnson v. Legard*, 6 M. & S. 60; *Stackpoole v. Stackpoole*, 4 Dru. & Warr. 320.

(v) *Heap v. Tonge*, 9 Hare, 104; *Pulvertoft v. Pulvertoft*, 18 Ves. 92. See also Brown's Law Dictionary, title *Marriage Settlement*.

(w) May on Voluntary Conveyances, p. 397.

(x) 3 Sim. 14.

creditors to restrain the trustees from executing the trusts of the subsequent deeds until they had performed the trusts of the first, the court refused to make any order. And in *Garrard v. Lauderdale* (y), which was the like case of an assignment of personal property to trustees for the payment of certain scheduled creditors, but who did not execute the deed,—In the Vice-Chancellor's judgment it was said: "I take the real nature of the deed to be, not so much a conveyance vesting a trust in A. for the benefit of the creditor of the grantor, but rather an arrangement made by the debtor for his own personal convenience and accommodation—for the payment of his own debts in an order prescribed by himself, over which he retains power and control, and with respect to which the creditors can have no right to complain, inasmuch as they are not injured by it—they waive no right of action, and are not executing parties to it." And in *Acton v. Woodgate* (z) the result of the decisions is thus stated:—"It is established by the authorities that if a debtor conveys property in trust for the benefit of his creditors to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and before any payment made by the agent, or communication made by him to the creditors, had recalled the money so delivered."

And is an arrangement for the debtor's own benefit and convenience.

Effect of communication of deed to creditors, followed by forbearance on the faith of the deed.

There has been a considerable conflict of dicta, or apparent conflict, as to whether the mere fact of communication of a trust in favour of creditors to the creditors will deprive the donor of that power of revocation which it has been shown he possesses. It is submitted that the true principle is correctly laid

(y) 3 Sim. 1.

(z) 2 My. & K. 495.

down by Sir John Leach, M.R., in the last-mentioned case of *Acton v. Woodgate* (a), and that the trust, after communication, is irrevocable, if the creditors have been "thereby induced to a forbearance in respect of their claims which they would not have otherwise exercised."

Or, in the words of Sir J. Romilly, M.R., in *Biron v. Mount* (b), "The principle is well laid down by Lord

"St. Leonards in *Field v. Donoughmore* (c), where he states, 'It is not absolutely essential that the creditor should execute the deed; if he has assented to it, and

"if he has acquiesced in it, or acted under its provisions

"and complied with its terms, and the other side express

"no dissatisfaction, the settled law of the court is that

"he is entitled to its benefits.' About that I entertain

"no doubt, but I apprehend for this purpose he must

"do some acts which amount to acquiescence. It is

"not sufficient merely to stand by and take no part

"at all in the matter. It is true that in some cases,

"as is said in the case of *Nicholson v. Tutin* (d), some-

"thing may be inferred from his standing by, until he

"has lost a remedy which he might have had at law,

"if he had not come in under the deed. But no such

"question arises here. In my opinion, he must do

"some act" (e).

Forbearance should be evidenced by some positive act.

Where a creditor is party to the trust deed, and executes it, the deed is as to that creditor irrevocable (f); on the other hand, a creditor who for a long time delays to execute the deed (g), or who sets up a title adverse to the deed (h), will not be allowed to claim the benefit of its provisions; as neither will a creditor

Effect of the creditor being a party to the deed.

(a) 2 My. & K. 495.

(b) 24 Beav. 649.

(c) 1 Dru. & War. 227.

(d) 2 K. & J. 23.

(e) *Kirlean v. Daniel*, 5 Hare, 499; *Griffith v. Ricketts*, 7 Hare, 307; *Cornewaite v. Frith*, 4 De G. & Sm. 552; *Siggers v. Evans*, 5 Ell. & B. 367.

(f) *Mackinnon v. Stewart*, 1 Sim. N.S. 88; *La Touche v. Earl of Lucan*, 7 C. & F. 772; *Montefiore v. Brown*, 7 H. L. Cas. 241-266.

(g) *Gould v. Robertson*, 4 De G. & Sm. 509.

(h) *Watson v. Knight*, 19 Beav. 369.

to whom the existence of the deed has never been communicated (i).

V. *Equitable Assignments.*  
General rule  
of the old  
common law.

Respects in  
which equity  
infringed upon  
the rule of the  
old common  
law.

Regarding equitable assignments,—although Lord Coke says: “The great wisdom and policy of the “sages and founders of our law have provided that “no possibility, right, title, nor thing in action shall “be granted or assigned to strangers; for that would “be the occasion of multiplying of contentions and “suits, of great oppression of the people, and the sub- “version of the due and equal execution of justice,”—still, in equity, the reasons given by Lord Coke have been almost wholly disregarded; and, accordingly, from a very early period, assignments of a mere naked possibility, or of a chose in action, provided they were for valuable consideration, have been held valid in equity, upon the same principle that equity enforces the performance of agreements when such agreements are for value, and of course are not contrary to its own rules or to public policy (j). A mere expectancy, therefore, as that of an heir-at-law to the estate of his ancestor (k); or the interest which a person may take under the will of another, who is living (l); also, non-existing property to be acquired at a future time, as the future cargo of a ship (m), is assignable in equity for valuable consideration; and where the expectancy has fallen into possession, the assignment will be enforced (n).

Respects in  
which the  
common law  
even has in-  
fringed upon  
its own rule.

Even the common law from time to time broke in upon the old rule which prohibited the assignment of choses in action; e.g., in the case of negotiable instru-

(i) *Johns v. James*, 8 Ch. Div. 744.

(j) *Squib v. Wyn*, 1 P. Wms. 378; and see *Collyer v. Isaacs*, 19 Ch. Div. 342.

(k) *Hobson v. Trevor*, 2 P. W. 191.

(l) *Bennett v. Cooper*, 9 Beav. 252.

(m) *Lindsay v. Gibbs*, 22 Beav. 522.

(n) *Holroyd v. Marshall*, 10 H. L. Cas. 191.

ments; also where the debtor assented to the transfer of the debt, so as to enable the assignee to maintain a direct action against him, on the implied promise which resulted from such an assent (o). But in the case of assignments of bonds or other debts, it used to be necessary to sue in the name of the original creditor, the transferee being regarded rather as an attorney than as an assignee (p). More recently other future interests and choses in action were by statute made assignable at law; that is to say, by 8 & 9 Vict., c. 106, s. 6, contingent and future interests and possibilities, coupled with an interest in real estate; also, by 30 & 31 Vict., c. 144, policies of life assurance; and by 31 & 32 Vict., c. 86, policies of marine assurance. Lastly, by the Judicature Act, 1873 (q), s. 25, sub-sect. 6, debts and other legal choses in action, without any distinction, may now be assigned at law, *where the assignment is absolute*, and not by way of charge only; but the assignment is subject to all equities affecting the assignor. *And notice of assignment to be given to debtor to have effect.*

Contingent interests and possibilities.

Policies of life and marine insurance.

Debts and other legal choses in action under Supreme Court of Judicature Act.

In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, has always been considered a binding equitable assignment or (speaking accurately) an appropriation of so much money to or in favour of the creditor. Thus in *Burn v. Carvalho* (r), where A. had goods in the hands of B. as his agent at a foreign port, and being under liabilities to C., by letter to C. promised that he would direct, and by a subsequent letter to B. did direct, B. to deliver over the goods to D. as the agent of C. at that port; and before the delivery of the goods, A. was made

Order given by debtor to his creditor upon a third person, a good equitable assignment, i.e., appropriation.

(o) *Baron v. Husband*, 4 B. & Ad. 611.

(p) *De Pothonier v. De Mattos*, Ell. Bl. & Ell. 467.

(q) 36 & 37 Vict., c. 66; and see *In re Park Gate Waggon Works Co.* 17 Ch. Div. 234.

(r) 4 My. & Cr. 690.

bankrupt under an act of bankruptcy committed while his letter was on its way to B., and the goods were delivered by B. to D. in ignorance of the bankruptcy; the court held C. had a good title in equity to the goods.

Again, in *Diplock v. Hammond* (s), where A. had obtained a loan from B., and gave B. the following instrument, addressed to his (A.'s) debtor:—"I hereby authorise you to pay £365, being the amount of my contract, B. having advanced me that sum,"—the court held this to be a valid equitable assignment (t).

Mandate from principal to agent,—confers no right on the creditor.

But a mere mandate will not amount to an equitable assignment or appropriation, for such a mandate may be revoked at any time before it is executed (u). Thus, in *Rodick v. Gandell* (v), a railway company was indebted to the defendant, their engineer, who was greatly indebted to his bankers. The bankers having pressed for payment or security, the defendant, by letter to the *solicitors* of the company, authorised them to receive the money due to him from the company, and requested them to pay it to the bankers. The solicitors, by letter, promised the bankers to pay them such money, *on raising it*. Held, that this did not amount to an equitable assignment of the debt. "The extent of the principle," said Lord Truro, "to be deduced from the cases is, that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable

(s) 2 Sm. & G. 141; 5 De G. M. & G. 320.

(t) *Farquhar v. City of Toronto*, 12 Gr. 186.

(u) *Morrell v. Woollen*, 16 Beav. 197.

(v) 1 De G. M. & G. 763. And see *Ex parte Hall*, in re *Whitting*, 10 Ch. Div. 615.

"charge upon such fund ; in other words, will operate  
 "as an equitable assignment of the debts or fund to  
 "which the order refers. But I think that if I were  
 "to decide that *the authority to the solicitors* in the  
 "present case *to receive the debt* due from the company,  
 "and to pay what should be received to the bank,  
 "operated as an assignment in equity of the company's  
 "debt, I should extend the principle much beyond the  
 "warrant of the authorities. If an assignment had  
 "been intended, it would have been quite as easy to  
 "have sent the direction to the company as to the  
 "company's solicitors. It rather seems to have been  
 "intended that the bank should have no title or in-  
 "terest in the debt until the amount of the debt should  
 "have been ascertained, and some definite portion of it  
 "adjusted and realised."

In order that third parties may be bound, it is necessary, with regard to a chose in action, for the assignee, to do all that can be done to perfect the assignment, to do everything towards having possession which the subject admits; to do "that which is tantamount to obtaining possession by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as his property. For this purpose he must give notice to the legal holder of the fund: in the case of a debt, for instance, notice to the debtor is for many purposes tantamount to possession. If he omit to give that notice, he is guilty of the same degree and species of neglect as he who leaves a personal chattel to which he has acquired a title, in the actual possession, and under the absolute control, of another person" (*w*). Notice, then, is necessary to perfect the title, to give a complete right *in rem*, and not merely a right as against him who conveys his interest. If indeed the assignee is

Notice to legal holder by assignee of chose in action necessary to perfect title,—as against third person.

Such notice is tantamount to possession;

And gives a right *in rem*.

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(w) And see particularly *Williams v. Williams*, 17 Ch. Div. 437.



satisfied that the assignor will make no improper use of the possession in which he is allowed to remain, notice of the assignment is not necessary, for against the assignor the title is perfect without notice; but if the assignor, availing himself of the possession as a means of obtaining credit, should induce third persons to purchase from him as the actual owner, and they part with their money before the assignee's so-called pocket-conveyance is notified to them, the assignee must be postponed; and on being thus postponed, the assignee's security, it is true, is not invalidated; he had priority, but that priority he has not followed up, but has permitted another to acquire a prior title, because a better title, to the legal possession (x). Where, however, an assignee is unable to give the necessary notice, but has otherwise done all in his power towards taking possession, he will not lose his priority (y).

Assignee of chose in action takes subject to equities.

The assignee of a chose in action, although without notice, in general takes it subject to all the equities which subsist against the assignor. Thus, in *Turton v. Benson* (z), where a son on his marriage was to have from his mother, as a portion with his wife, exactly as much as his intended father-in-law should allow to his daughter, and privately, without notice to his mother, who treated for the marriage, the son gave a bond to the wife's father to pay back £1000 of the wife's portion seven years after, in consideration that the father-in-law should make the wife's portion £3000, instead of (as he had intended) £2000 only; and the

(x) *Ryall v. Rowles*, 2 L. C. 729; *Dearle v. Hall*, 3 Russ. 1; *In re Freshfield's Trust*, 11 Ch. Div. 198; *Buller v. Plunkett*, 1 J. & H. 441.

(y) *Feltham v. Clark*, 1 De G. & Sm. 307; *Langton v. Horton*, 1 Hare, 549; *Johnstone v. Cox*, 16 Ch. Div. 571; and see Brown's Dictionary, title *Notice*.

(z) 1 P. Wms. 496; see also *In re Knapman*, *Knapman v. Wreford*, 18 Ch. Div. 310; also Judicature Act, 1873, 36 & 37 Vict., c. 66, sec. 25, sub-sec. 6.

bond was afterwards assigned for the benefit of the creditors of the father-in-law; it was held, that the bond being void in equity in the hands of the father-in-law could not be made better by the assignment (a), in the hands of his creditors, although taken without notice of the son's fraud.

But though this rule generally holds good, it has been observed that length of time and other circumstances may make the case of the assignee stronger (b); and further, the equities affecting the assignor must be in respect of the very chose in action itself; and, moreover, an exception to the rule occurs in the case of negotiable instruments, "because if the rule were otherwise," Lord Keeper Somers observed, "it would tend to destroy trade, which is carried on everywhere by bills of exchange, and he would not lessen an honest creditor's security" (c). And the rule will yield in equity where a contrary intention appears from the nature and terms of the contract between the original contracting parties. Thus, debentures made payable to bearer were held to bind the company issuing them, in the hands of transferees for value, irrespective of any equities between the company and the original holders (d).

Exceptions to the general rule:

(1.) Special circumstances;

(2.) Negotiable instruments,—*e.g.*, (a.) Bills and notes;

(b.) Debentures payable to bearer.

By the Supreme Court of Judicature Act, 1873, it is provided,—“That an absolute assignment *in writing* “*under the hand* of the assignor (not purporting to be “by way of charge only) of any debt or other legal “chose in action, of which express *notice in writing*

Assignment of debts and legal choses in action under 36 & 37 Vict., c. 66, s. 25, § 6.

(a) *Barnett v. Sheffield*, 1 De G. M. & G. 371; *Athenæum Life Assurance Society v. Pooley*, 3 De G. & Jo. 294; *Graham v. Johnson*, L. R. 8 Eq. 36.

(b) *Hill v. Caillouel*, 1 Ves. Sr. 123; *Ex parte Chorley*, L. R. 11 Eq. 157.

(c) *Anon.* Com. Rep. 43; and see *Beckervaise v. Lewis*, L. R. 7 C. P. 372.

(d) *In re Blakley Ordnance Company*, L. R. 3 Ch. App. 154; *In re General Estates Company*, ib. 758. But see *Crouch v. Crédit Foncier of England*, L. R. 8 Q. B. 374.

"shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual IN LAW (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor" (e).

Assignments void for illegality: (1.) Assignments contrary to public policy.

A court of equity will, upon the ground of public policy, refuse to give effect to assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of their official duties. Thus, the pay of an officer in the army (f), and the salary of a judge given to him to support the dignity of his office, have been held not assignable; but, *semble*, such assignments are valid when the office is a sinecure or the duties have ceased (g).

(2.) Assignments affected by champerty and maintenance.

Courts of equity, on the like principles of public policy, will also refuse to give effect to assignments which partake of the nature of champerty, or maintenance, or buying of pretended titles (h). Thus, in *Stevens v. Bagwell* (i), one-fifth part of the share of prize-money, the subject of a suit *then depending* in the Admiralty Court, was assigned by the executrix of one of the captors and her husband to a navy agent, in

(e) *Brice v. Bannister*, 3 Q. B. D. 569.

(f) *Stone v. Liddendale*, 2 Anst. 533.

(g) *Arbuthnot v. Norton*, 5 Moors's P. C. C. 219; *Grenfell v. The Dean and Canons of Windsor*, 2 Beav. 550; *Willcock v. Terrell*, 3 Exch. Div. 323.

(h) *Reynell v. Sprye*, 1 De G. M. & G. 660. And disting. *Spear v. Lawson*, 15 Ch. Div. 426.

(i) 15 Ves. 139.

consideration of his indemnifying them from all costs on account of any suit touching the said prize-money, and paying to them the remaining four-fifths, if it should be recovered. *Held*, that the assignment was void as amounting to that species of maintenance which is called champerty, viz., the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it (j).

Upon the same principle of not giving any encouragement to litigation, especially when undertaken as a speculation, equity will not enforce the assignment of a mere naked right to litigate, i.e., of a right which, from its very nature, is incapable of conferring any benefit except through the medium of a suit, such as a mere naked right to set aside a conveyance for fraud (k). But the purchase of an interest *pendente lite* (l), or a mortgage *pendente lite* (m), or the advance of money for carrying on a suit, if the parties have a common interest (n), or if there exists between the parties the relation of father and son (o), or master and servant (p), will not be considered as maintenance or champerty (q). Moreover, a purchase from the defendant is always valid, he having the possession, and therefore something more than a mere naked right to litigate. (3.) Assignments of mere *lites pendentes*.

A purchase by an attorney *pendente lite* of the subject-matter of the suit is invalid (r); and an undis- (4.) Assignments by incapacitated persons.

(j) *Searle v. Hopwood*, 9 C. B. (N.S.) 566.

(k) *Prosser v. Edmonds*, 1 Y. & C. Exch. Ca. 481; *Powell v. Knowler*, 2 Atk. 226; *In re Paris Skating Rink Co.*, L. R. 5 Ch. Div. 959; and distinguishing *Seear v. Lawson*, 15 Ch. Div. 426; *In re Park Gate Waggon Works Co.*, 17 Ch. Div. 234.

(l) *Knight v. Bwyer*, 2 De G. & Jo. 421, 455.

(m) *Cockell v. Taylor*, 15 Beav. 103, 117.

(n) *Hunter v. Daniel*, 4 Hare, 420.

(o) *Burke v. Greene*, 2 Ball & B. 521.

(p) *Wallis v. D. of Portland*, 3 Ves. 503.

(q) *Dickinson v. Burrell*, 14 W. R. 412.

(r) *Simpson v. Lamb*, 7 Ell. & Bl. 84; *Anderson v. Radcliffe*, 6 Jur. N.S. 578.

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(1.) Recommendation must be imperative, i.e., certain.

*Firstly*, The words of recommendation used must be such that, upon the whole, they ought to be construed as imperative. No technical words are necessary, but the testator's words "willing or desiring" that the person on whom he has conferred property should make a disposition of it in favour of certain objects, if reasonably certain, will be construed as imperative, and as amounting to a trust; so also the words and phrases "wish and request" (u), "have fullest confidence" (v), "heartily beseech" (w), "well know" (x), "of course he will give" (y), are all taken in general as being imperative.

(2.) Subject-matter must be certain.

*Secondly*, The subject-matter of the recommendation or wish must be certain. Therefore where, as in *Bug-gins v. Yates* (z), a testator devises real property to his wife, to be sold for payment of his debts and legacies in aid of his personal estate, and declares that he does not doubt but his wife would be *kind to his children*, and it is insisted that this constitutes a trust of the personal estate for the testator's children, the court, if it thinks that these words give a right to no child in particular, or a right to no particular part of the estate, will hold that the clause is void for uncertainty. Therefore in *Curtis v. Rippon* (a), where the testator, after appointing his wife guardian of his children, gave all his property to her, "trusting that she would, in fear of God and in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the poor,"—the court held that the wife was absolutely entitled to the

(u) *Godfrey v. Godfrey*, 11 W.R. 554; *Liddard v. Liddard*, 28 Beav. 266.

(v) *Shovelton v. Shovelton*, 32 Beav. 143. But see *Lambe v. Eames*, L. R. 6 Ch. App. 597; *Hutchinson v. Tennant*, 8 Ch. Div. 540; *Dawkins v. Lord Penrhyn*, 4 App. Ca. 51.

(w) *Meredith v. Heneage*, 1 Sm. 553.

(x) *Bardswell v. Bardswell*, 9 Sim. 319.

(y) *Robinson v. Smith*, Mad. & Geld. 194.

(z) 9 Mod. 122.

(a) 5 Mad. 434.

property; for there was no ascertained part of it provided for the children, and the wife was at liberty to diminish the capital either for the Church or for the poor; consequently there was no trust for the children. And generally, where there is an absolute gift of property to one person, and a recommendation that he or she should give to a certain other person "*what shall be left*" at his death, "*or what he shall die possessed of*," the subject will be considered uncertain (b).

*Thirdly*, The objects or persons intended to have the benefit of the recommendation or wish must be certain. Thus, in *Sale v. Moore* (c), where a testator bequeathed the residue of his property to his wife, not doubting that she would consider *his near relations*, as he would have done if he had survived her, the V. C. held that the objects were uncertain: "Who were the objects of the trust? Did the testator," he asked, "mean relations at his own death, or at his wife's death?" Of course, in such a case as *Sale v. Moore*, another Vice-Chancellor might (and probably would) arrive at the conclusion that the testator's next of kin at the time of his wife's death, regarded as the date of his own death, were the beneficiaries intended; and in that case, the objects being certain, the trust over after the wife's life-interest would take effect.

3. The object must be certain.

The tendency of the later decisions is against construing precatory or recommendatory words as trusts. If, therefore, the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative, or if it appears from the context that the first taker was intended to have a discretionary power to withdraw any part of the subject from the object of

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(b) *Pope v. Pope*, 10 Sim. 1; *Green v. Mursden*, 1 Drew. 646; *Constable v. Bull*, 3 De G. & Sm. 411.

(c) 1 Sim. 534.

the wish or request, or where the motive by which the giver was actuated is stated, no trust will be created (*d*). So where there was a gift of stock to a person, and there was added parenthetically, *to enable him to assist such children of my deceased brother as he may find deserving of encouragement*, it was held an absolute bequest, and that no trust was created for the children, or in fact intended to be created (*e*).

If trust be intended, but not validly created, it ensures for the benefit not of the trustee, but of the heir-at-law or next of kin.

*Briggs v. Penny.*

But the legatee or devisee does not always take beneficially where the court fails to find a valid trust; nor in fact does he usually take beneficially; on the contrary, he is in general excluded in favour either of the heir or of the next of kin of the testator, according as the property is real estate or is personal estate. And it is not necessary, in order to exclude the legatee or devisee from taking the beneficial interest, that there should be a valid or effectual trust; it is only necessary that it should clearly appear that a trust was intended. Therefore where, in *Briggs v. Penny* (*f*), the testatrix, after giving, among other legacies, a sum of £3000 to Sarah Penny, and in addition a like sum of £3000 for the trouble she would have as executrix, bequeathed all her residuary personal estate to the said Sarah Penny, "well knowing that she will make a good use, "and dispose of it in a manner in accordance with my "views and wishes,"—it was held by Lord Truro that Sarah Penny did not take the residue for her own benefit. "There is nothing," said his Lordship, "on "the face of the words which implies that no trust was "intended; 'views and wishes' mean 'designs and "desires;' and the expression of confidence that Miss "Penny would dispose of the property in a manner in

(*d*) *Howorth v. Dewell*, 29 Beav. 18; *Lambe v. Eames*, L. R. 10 Eq. 267; and see *Mussoorie Bank v. Raynor*, 7 App. Ca. 321.

(*e*) *Benson v. Whittam*, 5 Sim. 22; and see *Roubootham v. Dunnett*, 8 Ch. Div. 430.

(*f*) 3 Mac. & G. 546; and see *In re Fleetwood*, *Sidgreaves v. Brewer*, 15 Ch. Div. 594.

"accordance with the testatrix's designs or desires, " appears to me to amount to a declaration that Miss Penny was to hold the property for that purpose, or, " in other words, upon trust; and if so, *that is sufficient to exclude Miss Penny from taking the beneficial interest.* " *Once establish that a trust was intended, and the legatee cannot take beneficially.* If a testator gives upon trust, " though he add not a syllable to denote the objects of " that trust, *the legatee is excluded and the next of kin take.* " Now in this case, the fact that besides a legacy of " £3000 another legacy is expressly given to Miss " Penny, 'in addition, for the trouble she will have in " acting as my executrix,' clearly shows that Miss Penny " was not intended to take the *residue* beneficially; " because if Miss Penny was to take the *WHOLE* residue " beneficially, the testatrix could have no object in " taking out of that residue the legacy of £3000 for " her trouble; in fact, that legacy is only consistent with " the hypothesis, that the whole residue was not to be " taken beneficially" (g).

Where property (real or personal) is given by will to a trustee, or being personal, is bequeathed to or vests in the executor, and there is nothing on the face of the will suggesting that the beneficial interest is to be taken by such trustee or executor, and, *a fortiori*, if the contrary intention appears on the face of the will, then the beneficial interest is undisposed of by the will, and a further writing to be executed as a will is necessary to dispose of the beneficial interest; and therefore no trust declared by word of mouth only, or even declared by writing (unless such writing is duly executed and attested as a will, or, being in existence at the date of, is incorporated in, the will), is permitted to be valid (h);

VII. *Secret trusts*,—when and when not enforced.

(g) *Langley v. Thomas*, 6 De G. M. & G. 645; *Bernard v. Minshull*, Johns. 276; and disting. *Stead v. Mellor*, L. R. 5 Ch. Div. 225.

(h) *Adlington v. Cann*, 3 Atk. 141; *Muckleston v. Brown*, 6 Ves. 52; *Allen v. Maddock*, 11 Mov. P. C. 427; *Singleton v. Tomlinson*, 3 App. Ca. 404.



but the property attempted to be subjected to such ineffective trust will go, so far as it consists of real estate, to the heir-at-law or residuary devisee, and, so far as it consists of personal estate, to the next of kin or residuary legatee. On the other hand, if the legal devisee or executor-legatee appears on the face of the will to be intended to take the beneficial interest also, then, as a general rule, no parol evidence to contradict or vary the plain effect of the will is admissible. But to this general rule there is one great exception, namely, the usual exception on the ground of fraud, viz., that parol evidence may be admitted to prove a fraud on the part of such devisee or legatee in procuring the gift to be made to him for his own benefit by the will, in that he undertook a certain *secret trust*, and that such undertaking on his part was the cause of the will being made as it is made; and in that case the court will enforce discovery of the secret trust; and if it find the secret trust lawful, it will decree execution thereof; and if it find the secret trust unlawful, it will give the property, if real, to the heir-at-law or residuary devisee, and if personal, to the next of kin or residuary legatee of the testator (i); and the court will also, if necessary, sever when it can the lawful trust from the unlawful one (j). But if no trust is imposed by the will, and no communication was made in the testator's lifetime to the devisee or legatee, the devise or bequest will be good, although the devisee or legatee may, notwithstanding the absence of legal obligation, be disposed from the bent and impulse of his own mind to carry out what he believes to have been the testator's wishes (k).

VIII. Powers  
in the nature of  
trusts; other-

There remains to be, *eighthly*, considered a class of cases, in which powers are given to persons accompanied

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(i) *Strickland v. Aldridge*, 9 Ves. 519.

(j) *Re Birkett*, 9 Ch. Div. 576.

(k) *Lewin on Trusts*, 5th edition, 52; *Cullen v. Attorney-General*, L. R. 1 H. L. 190; *Rowbotham v. Dunnett*, 8 Ch. Div. 430.

with such words of recommendation in favour of certain objects as to render them powers in the nature of trusts; so that the failure of the donees to exercise such powers in favour of the intended objects will not turn to their prejudice, for the court will take upon itself the duties of the donees of such powers (*l*). It is perfectly clear that where there is a mere power of disposing, and that power is not executed, this court cannot execute it (*m*). It is equally clear that wherever a trust is created, and the execution of that trust fails by the death of the trustee or by accident, this court will execute the trust (*n*). But there is not only a mere trust and a mere power, but there is also known to the court a power which the court considers as partaking so much of the nature and qualities of a trust, that if the person who has the power does not discharge the duty which that power imposes, the court will discharge the duty in his place (*o*). For example:—

wise, trusts in the garb (or under the disguise) of powers.

In *Burrough v. Philcox* (*p*), where a testator, after giving life-interests in certain stock and real estate to his two children, with remainder to their issue, declared that in case his two children should both die without leaving lawful issue, the survivor of his two children should have power to dispose by will of the real and personal estate, "amongst my nephews and nieces or their children, either all to one of them, or to as many of them as my surviving child shall think proper,"—it was held by Lord Cottenham that a trust was created in favour of the testator's nephews and nieces and their children, subject to a power of selection and distribution in the surviving child of the testator. "When there appears," observes his Lordship,

*Burrough v. Philcox*,—power equal to a trust subject to right of selection.

(*l*) *Gude v. Worthington*, 3 De G. & Sm. 389; *Izod v. Izod*, 32 Bea. v. 242.

(*m*) *Brown v. Higgs*, 8 Ves. 570.

(*n*) *Ibid.*

(*o*) *Ibid.*, 8 Ves. 561; *Tweeddale v. Tweeddale*, 7 Ch. Div. 633; *Wheeler v. Warner*, 1 S. & S. 304.

(*p*) 5 My. & Cr. 72.

"a general intention in favour of a class and a particular intention in favour of individuals of that class, and who are to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favour of the class."

*Salisbury v. Denton*,—to same effect.

So again, in *Salisbury v. Denton* (q), where a testator by will gave a fund to be at the disposal of his widow by her will, therewith to apply a part for charity, the remainder to be at her disposal among my "relations, in such proportions as she may be pleased to direct;" and the widow died without exercising the power of determining the proportions in which each beneficiary was to take,—the court held that the bequest was not void for uncertainty, but that the fund should be divided in moieties, one of such moieties to be for charitable purposes, and the other moiety to be for such of the testator's relatives as were capable of taking within the statutes of distribution (r).

The shares of the appointees are equal.

The case lastly before referred to shows, that when equity executes an unexecuted power-trust or trust-power of this sort, she applies her own maxim, that equality is equity, and divides the property equally; although the trustee, if he had chosen to exercise the power, might have used a discretion to give unequal shares (s).

IX. *Liability of purchaser to see to the application of purchase-money, where there are cestui que trustent.*

A *cestui que trust* is the peculiar favourite of courts of equity, and equity has sought by the most stringent rule to protect a *cestui que trust* against the *mala fides* or carelessness of his trustee. In furtherance of this object, the doctrine was early established in equity, that if a trustee for sale had to pay over the purchase-

(q) 3 K. & J. 529.

(r) *Little v. Neil*, 10 W. R. 592; *Gough v. Bult*, 16 Sim. 45.

(s) *Willis v. Kymer*, 9 Ch. Div. 187.

money to other persons in given shares, the purchaser was bound to see that the trustee applied the purchase-money accordingly, unless the instrument by which the trust was created contained a declaration that the trustee's receipt should be a good discharge; and in the absence of such a declaration, the purchaser was himself responsible for the misapplication of the money. But as this rule bore very hardly on purchasers, and was in the way of that unfettered disposition of property which the law so much encourages, several legislative Acts have been from time to time passed with the object of relieving the purchaser of this most onerous liability. It will be profitable, firstly, to state the old rules by which the purchaser's liability was regulated, and then to state the provisions and applicability of the various statutes.

1. It being the general rule that personalty constitutes the natural and primary fund for the payment of the debts of the testator, the purchaser of the whole or any part of the personal estate was not bound to see that the purchase-money for it was applied by the executors in discharge of the debts (t). But even in this case, if there was any fraud or participation in fraud on the part of the purchaser, he would not be exonerated; *e.g.* where an executor disposes of his testator's assets in payment of a debt of his own, and the purchaser knows of such intended misapplication beforehand (u). (1.) Personalty, — purchaser exonerated.

2. Where real estate is devised to trustees upon trust to sell for the payment of debts or of debts and legacies generally, or if the lands are merely charged with such payment, the purchaser was exonerated (v). (2.) Realty, — (a.) Trust or charge for payment of debts and legacies generally, — purchaser exonerated.

(t) *Ewer v. Corbet*, 2 P. W. 149; *Keane v. Roberts*, 4 Mad. 356.

(u) *Hill v. Simpson*, 7 Ves. 152; and see *Pearson v. Scott*, 9 Ch. Div. 198; *Jones v. Sidwasser*, 16 Ch. Div. 577; *In re Cope*, *Cope v. Cope*, 16 Ch. Div. 49.

(v) *Elliot v. Merryman*, 1 L. C. 64; *Jebb v. Abbot*, cited Co. Litt. 290 b.; *Dowling v. Hudson*, 17 Beav. 248.

(b.) Trust for payment of certain debts or legacies, only,—purchaser not exonerated.

3. But if the trust directed lands to be sold, or if the will contained a charge upon the lands for the payment of certain debts, mentioning in particular to whom those debts were owing, or if there was a trust or a charge for the payment of legacies or annuities only, the purchaser was bound to see to the proper application of the purchase-money (*w*).

*Secondly*, The provisions of the successive statutes bearing upon the matter have been as follows:—

Lord St. Leonards' Act, 22 & 23 Vict., c. 35.—purchase or mortgage money only.

(1.) By stat. 22 & 23 Vict., c. 35, s. 23, it was enacted that "the *bond fide* payment to, and the receipt of, any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, *unless the contrary shall be expressly declared by the instrument creating the trust or security*" (*x*). This statute applied only to instruments executed on or after the 13th August 1859, being the date when the Act came into operation.

Lord Cranworth's Act, 23 & 24 Vict., c. 145,—any trust money whatsoever.

(2.) By stat. 23 & 24 Vict., c. 145, s. 29, it is further enacted, that "the receipt in writing of any trustees or trustee for ANY money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be a sufficient discharge for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof." This statute applied only to instruments coming into operation on or after the 28th August 1860, being the date when the Act itself came into operation.

(*w*) *Elliot v. Merryman*, 1 L. C. 64; *Johnson v. Kennett*, 3 My. & K. 630.

(*x*) *Bennett v. Lytton*, 2 J. & H. 158.

(3.) By stat. 44 & 45 Vict., c. 41, s. 36, "the receipt in writing of any trustees or trustee for ANY money, securities, or other personal property or effects, payable, transferable, or deliverable to them or him under ANY TRUST OR POWER, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof." Moreover, this section of the Act applies to all trusts whensoever created, and whether before or after the Act.

Conveyancing Act, 1881, 44 & 45 Vict., c. 41, —any trust moneys, securities, &c.

Since the changes successively effected by these enactments, questions as to the power to give receipts, and as to the purchaser's liability to see to the application of his purchase-money, have become of less and less practical importance. And having regard to the comprehensive character of the latest of the three statutes, and to the fact of its being retrospective, the better opinion would seem to be, that a *bond fide* purchaser paying his purchase-money to the trustee and obtaining his written receipt for same, and not knowingly participating in any fraud of the trustee's, is now in all cases exonerated from seeing to the application of his purchase-money; and that he need not in any case, so far as regards charges of specified debts or of legacies and annuities, have recourse to the provisions contained in the 5th section of the same Act for the discharge of such *incumbrances* upon a sale (y). It might still be prudent, however, to require the specified creditors, and the legatees and annuitants who have charges on the land, to concur in the conveyance for the purpose of releasing their charges (z).

General conclusion on the Acts,—that the purchaser is now in all cases exonerated;

And it appears to be still most necessary in all

(y) See definition of *Incumbrances*, sec. 2 of the Conveyancing Act, 1881.  
(z) *Wms. Real Assets*, p. 90; and see *Dart's V. & P.* 4th ed. p. 564.

Provided he  
purchase from  
the true  
vendor.

cases that the purchaser should ascertain that the person professing to sell as trustee or assuming to exercise that "trust or power" which is referred to in the last-mentioned Act, is in fact the trustee or other person authorised for that purpose or invested with such trust or power,—a question not always very easy to determine, but the answer to which is to be gathered primarily from the words of the trust instrument, and, secondly, from the provisions in that behalf contained in Lord St. Leonards' Act above cited, which distinguishes the cases in which the trustee of the will is to be the vendor from those cases in which the executor is to be the vendor,—in the absence of a properly qualified beneficiary entitled and able to sell: *scil.* the trustee being made the vendor where the charged lands are devised to him in fee-simple or for other the testator's whole estate therein, and the executor being made the vendor in all other cases. But, *nota bene*, the word "executor" in Lord St. Leonards' Act does not include X the word "administrator" (a), and that defect is not yet supplied by any legislation (b).

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(a) See *In re Clay v. Tetley*, 16 Ch. Div. 3; *In re Cope, Cope v. Cope*, 16 Ch. Div. 49, and the cases cited in the argument in these two cases.

(b) See Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 38; also the Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 40.

## CHAPTER III.

## EXPRESS PUBLIC [OR CHARITABLE] TRUSTS.

CHARITIES are in general highly favoured in the law, and charitable gifts have accordingly sometimes received a more liberal construction than gifts to individuals. But in certain other respects charities are treated on the same level as private individuals ; and in one respect to be hereafter specified, charities are treated with some little disfavour. We shall consider those various respects in the order above enumerated.

*Firstly*, Charities are sometimes favoured above individuals :—

Charities  
favoured by  
the law.

I. Respects  
in which  
charities are  
favoured,—

(1.) Thus, if the testator has expressed an absolute intention to give a legacy to charitable purposes, but he has left uncertain, or to some future act, the mode by which his intention is to be carried into effect, the Court of Chancery, if no mode is pointed out, will of itself supply the defect and enforce the charity (a). *Nota bene*, that the *cestui que trust*, if a private individual, would, in such a case, lose the benefit of the trust, on the ground of uncertainty in the object.

(1.) General  
intention effec-  
tuated.

It is, in fact, a well-established principle that if the bequest be for a charity, it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are *in esse* or not, or whether the legatee be a corporation capable in law of taking or not,

If gift be for  
charity, equity  
will effectuate  
it at all events.

(a) *Pocock v. Att.-Gen.*, L. R. 3 Ch. Div. 342.



But the object must be distinctly charitable.

or whether the bequest can be carried into operation or not; for in all these and the like cases, the Court of Chancery will treat it as a valid charitable bequest, and will dispose of it for such charitable purposes as it shall think fit. For example, if a man bequeaths a sum of money to such charitable uses as he shall direct by codicil annexed to his will or by note in writing, and he leaves no direction by codicil or note in writing, the Court of Chancery, applying the rule that the nomination of the particular objects is only the mode, and the gift to the charity the substance, of the testamentary disposition, will carry into effect the general intention of charity. But the object must be distinctly charitable in order to the court construing it in that favourable way (b); and therefore where the bequest may, in conformity to the express words of the will, either be disposed of in charity of a discretionary private nature, or be employed for any general, benevolent, or useful purpose, or for any general purpose whether charitable or otherwise, or for charitable or other general purposes at discretion, the bequest will be void, as being not exclusively charitable, and also too general and indefinite for the Court of Chancery to execute. Therefore if a testator makes a bequest to trustees for such benevolent, religious, and charitable purposes, or for such charitable or public purposes, as they should in their discretion approve of, the legacy cannot be supported, and the property devolves on the next of kin of the testator (c).

(1a.) Doctrine of *Cy-pres*.

(1a) Where the literal execution of the trusts of

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(b) Charities are the objects specified as such in the stat. 43 Eliz., c. 4, and such other objects as the courts have held to be "within the spirit and intendment" of that statute. See Brown's Dictionary, title *Charitable Uses*.

(c) *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 522; *Ellis v. Selby*, 1 My. & Cr. 286; *Bates v. Eley*, L. R. 1 Ch. Div. 473; *In re Jarman's Estate*, *Leaver v. Clayton*, 8 Ch. Div. 584, and compare *Cocks v. Manners*, L. R. 12 Eq. 574, distinguished in *Re Dutton*, 4 Exch. Div. 45.

a charitable gift becomes inexpedient or impracticable, the court will execute them *cy-pres*, i.e., as nearly as it can to the original purpose, and so as to execute them in substance. The general principle upon which the court acts is thus laid down by Lord Eldon in the leading case of *Moggridge v. Thackwell* (d), viz., "that if the testator has manifested a general intention to give to a charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." Thus, where there was a bequest of the residue of the testator's estate to a company to apply the interest of a moiety "unto the redemption of British slaves in Turkey and Barbary," one-fourth to charity schools in London and its suburbs, and one-fourth towards poor and destitute freemen of the company; there being no British slaves in Turkey and Barbary, the court directed a new scheme to be framed *cy-pres*, and approved of a scheme which gave the moiety thus undisposed of to the donees of the other fourth parts (e).

Applies only where there is a general intention of charity.

The doctrine of *cy-pres*, it will be seen, is held to be only applicable where the testator has manifested in his will a *general* intention of charity, and therefore will not be applicable whenever such general intention is not to be found. If, therefore, it is clearly seen that the testator had but one *particular* object in his mind, as, for example, to build a church at W., and that purpose cannot (by reason of the Mortmain Act or otherwise) be answered, the next of kin will take (f).

Limit to the *Cy-pres* doctrine.

(d) 7 Ves. 69; and see *In re Williams*, L. R. 5 Ch. Div. 735; *In re Birkett*, 9 Ch. Div. 576.

(e) *Att.-Gen. v. The Ironmongers' Co.*, 2 Beav. 313.

(f) *Clark v. Taylor*, 1 Drew. 642; *Loscombe v. Wintringham*, 13 Beav. 87.

(a.) Defects of conveyance supplied.

(2.) In further aid of charities, the court will supply all defects of conveyances, where the donor hath a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute (*g*). *Note here*, that in the case of private individuals the imperfection of the conveyance, being voluntary, would be fatal to the creation of the trust.

(3.) Resulting trusts in gifts to charities.

3. A third respect in which charities are favoured is in respect of resulting trusts. The following rules as to resulting trusts in gifts to charities are laid down in *Lewin on Trustees* (*h*).

(a.) Where a general charitable intention, no resulting trust.

(a.) Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularises no objects (*i*), or such as do not exhaust the proceeds (*j*), the court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund or the surplus shall be applied.

(b.) So too where rents are exhausted by the object indicated, but subsequently increase.

(b.) Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds, but in consequence of an increase in the value of the estate, an excess of income subsequently arises, the court will order the excess or surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*k*).

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(*g*) *St.* 1171 ; *Sayer v. Sayer*, 7 Hare, 377 ; *Innes v. Sayer*, 3 Mac. & G. 606.

(*h*) *Pp.* 130, 131.

(*i*) *Att.-Gen. v. Herrick*, Amb. 712.

(*j*) *Att.-Gen. v. Tonna*, 2 Ves. Jr. 1.

(*k*) *Thetford School Co. & Rep.* 130 *b* ; *Beverley v. Att.-Gen.* 6 H. L. Cas. 310 ; *Att.-Gen. v. Caius College*, 2 Kee. 150 ; *Att.-Gen. v. Marchant*, L. R. 3 Eq. 424.

But to these two rules there is the following exception, viz., even in the case of charity, if the settlor do not give the land, or the whole rents of the land, but noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances, either result to the heir-at-law (l), or belong to the donee of the property, subject to the charge (m).

Exception,—  
where rents are  
not exhausted  
at time of gift.

Secondly, Charities are sometimes treated on a level exactly with individuals.

II. Respects in  
which charities  
are treated on  
a level with  
private  
individuals.

(1.) Thus, if a testator gives his property to such person (upon trust) as he shall hereafter name to be his executor, and afterwards he appoints no executor, or if an estate is devised (upon trust) to such person as the executor shall name, and no executor is appointed; or if, an executor being appointed, he dies in the testator's lifetime, and no other is appointed in his place; in all these cases, if the bequest be in favour either of a charity or of an individual, the Court of Chancery will assume the office of an executor, and carry into effect that bequest; *scilicet*, because the beneficiary is certain, although the legal owner is uncertain (n). And an executor according to the tenor might even be constituted by the Probate Division of the High Court in such a case (o).

(1.) Want of  
executor  
supplied.

(2.) And to give another instance of the equal treatment of charities and individuals, lapse of time in equity is a bar in the case of charitable trusts, exactly as it is (where it is) in cases of mere private trusts

(2.) Lapse of  
time a bar.

(l) *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 308.

(m) *Beverley v. Att.-Gen.* 6 H. L. Cas. 310; *Att.-Gen. v. Southmoulton*, 5 H. L. Cas. 1; *Att.-Gen. v. Trin. Coll. Camb.* 24 Beav. 383.

(n) *Mills v. Farmer*, 1 Mer. 55, 96; *Moggridge v. Thackwell*, 7 Ves. 36.

(o) *Re Bell*, 4 Prob. Div. 85. And see Brown's Dictionary, title *Executor according to the Tenor*.

and no further; but, of course, where there is a breach of trust of which the purchaser has notice, lapse of time is no bar either in the case of charities or in the case of individuals; and under the Judicature Act, 1873, sect. 25, sub-sect. 2, as between an express trustee and his *cestui que trust*, no lapse of time is a bar in respect of a breach of any such trust. Thus, in the case of a charitable trust, where a corporation had purchased *with notice of the trust*, and had held the property under an adverse title for one hundred and fifty years, it was decided that the corporation should reconvey the property upon the original trusts (*p*).

III. One respect in which charities are disfavoured,—

*Thirdly*, It remains to specify the one respect in which charities are treated with disfavour, compared with individuals. It is this:—

Assets not marshalled in favour of charities.

Assets will not be marshalled by a court of equity in favour of a charity. Thus, if a testator give his real and personal estate (consisting of personalty savouring of realty, as leaseholds, and also of pure personalty) to trustees, upon trust to sell and pay his debts and legacies, and bequeath the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate and the personalty savouring of realty, in order to leave the pure personalty for the charity (*q*). The rule of the court in such cases is to appropriate the fund, as if no legal objection existed as to applying any portion of it to the charity legacies; and then to hold such proportion of the charity legacies to fail as would in that way fall to be paid out of the prohibited fund (*r*). But, of course, although the court will not

(*p*) *Att.-Gen. v. Christ's Hospital*, 3 My. & K. 344.

(*q*) *Fourdrin v. Gowdey*, 3 My. & K. 397.

(*r*) *Williams v. Kershaw*, 1 Keen, 274 n.; *Robinson v. Governors of the London Hospital*, 10 Hare, 19; Tudor's L. C. in Real Prop. 491.

itself marshal, the testator may direct his property to be marshalled in favour of the charity, and the court is then most ready to carry out his directions most favourably for the charity (s). Unless by express direction of the testator.

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(s) *Miles v. Harrison*, L. R. 9 Ch. App. 316; and see *Champney v. Dacey*, 11 Ch. Div. 949.

Resulting trust may be rebutted by evidence of purchaser's intention ;

*e.g.*, By the contrary presumption of advancement.

Resulting trusts, moreover, as they arise from an equitable presumption, may be rebutted by parol evidence to the contrary of such presumption, that is to say, by evidence showing the intention of the person who advanced the purchase-money to have been that the person to whom the property was transferred should in fact take for his own benefit (*h*). Also, where the purchaser is under a legal, or, in certain cases, a merely moral obligation to maintain or otherwise provide for the person in whose name the purchase is made, equity raises a presumption that the purchase was intended as an advancement. Therefore, as to purchases made in the name of children or of persons similarly favoured, it may be laid down as a general rule, that there will *prima facie* be no resulting trust for the purchaser, but, on the contrary, a presumption arises that an advancement was intended ; in other words, the equitable presumption of a resulting trust in favour of the actual purchaser is in such cases met and defeated by the other and contrary equitable presumption of advancement.

(*a.*) In whose favour it will be raised.

(*a.*) In whose favour this contrary presumption of advancement will be raised.

1. Legitimate child.

1. In favour of a legitimate child (*i*).

2. One to whom the purchaser has placed himself *in loco parentis*.

2. In favour of any person with regard to whom the person advancing the money has placed himself *in loco parentis* ; *e.g.*, in *Beckford v. Beckford* (*j*), an illegitimate son, in *Ebrand v. Dancer* (*k*), a grandchild, whose father was dead (*l*), and in *Currant v. Jago* (*m*), the nephew of a wife, were upon this doctrine of

(*h*) *Deacon v. Colquhoun*, 2 Drew. 21 ; *Wheeler v. Smith*, 1 Giff. 300 ; *Lane v. Dighton*, Amb. 409 ; and see *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

(*i*) *Sidmouth v. Sidmouth*, 2 Beav. 447 ; *Dyer v. Dyer*, 2 Cox, 92.

(*j*) Loft. 490.

(*k*) 2 Ch. Ca. 26.

(*l*) See *Soar v. Foster*, 4 K. & J. 152.

(*m*) 1 Coll. C. Ca. 261.

advancement held entitled to property purchased in their names.

### 3. In favour of a wife (*n*).

3. A wife.

Thus in *Drew v. Martin* (*o*), where a husband entered into an agreement for the purchase of land in the name of himself and his wife, and died before the whole of the purchase-money was paid,—*Held*, that the purchase enured for the benefit of the widow, and that the unpaid purchase-money was payable out of the husband's personal estate.

(*b*.) On the other hand, the presumption of advancement has not been extended to the illegitimate children of a daughter of the actual purchaser, that is to say, to (in a sense) illegitimate grandchildren (*p*); nor will the presumption arise when the purchaser makes the purchase in the names of himself and a woman or in the name of the woman alone, with whom he has contracted an illegal marriage, as in the case of a marriage with a deceased wife's sister (*q*), or with whom he has contracted no marriage at all, as in the case of a mere mistress or concubine or kept woman (*r*).

(*b*.) In whose favour it will not be raised.

Also in *In re De Visme* (*s*), it was decided that where a married woman had, out of her separate property, made a purchase in the name of her children, no presumption of advancement arose, inasmuch as a married woman was under no obligation, as the law then stood, to maintain her children (*t*); and, in the general case, the decision of the court would be the same still,

(*n*) *Drew v. Martin*, 2 H. & M. 130; *In re Eykyn's Trusts*, L. R. 6 Ch. Div. 115.

(*o*) 2 H. & M. 130.

(*p*) *Tucker v. Burrow*, 2 H. & M. 515; and see *Forrest v. Forrest*, 13 W. R. 380.

(*q*) *Soar v. Foster*, 4 K. & J. 152.

(*r*) *Rider v. Kidder*, 10 Ves. 360.

(*s*) 2 De G. Jo. & S. 17.

(*t*) *Holt v. Frederick*, 2 P. Wms. 356.



notwithstanding that by the Married Women's Property Act, 1870 (33 & 34 Vict., c. 93), a married woman having separate property under that Act is now laid under some liability to maintain her lawful children (*u*).

The presumption is rebuttable by parol evidence.

His contemporaneous act and declarations are evidence both for and against the purchaser.

The presumption of advancement being an equitable presumption may be rebutted by parol evidence. "The advancement of a son is a mere question of intention, and, therefore, facts antecedent or contemporaneous with the purchase, or so immediately after it as to constitute a part of the same transaction, may properly be put in evidence for the purpose of rebutting the presumption" (*v*). In *Williams v. Williams* (*w*), it was objected that a parol declaration by the father at the time that he intended the son to hold as trustee, amounted to the *creation* of a trust in his own favour, and was therefore by the Statute of Frauds rendered inadmissible. But this objection was thus answered: that "as the trust would result to the father, were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration" (*x*).

*A fortiori* parol evidence may be given by the son to show the intentions of the father to advance him; for such evidence is in support both of the legal interest of the son and of the equitable presumption (*y*).

His subsequent acts and declarations are evidence against but not for the purchaser.

The act and declarations of the father *subsequent* to the purchase may be used in evidence against him by

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(*u*) *Bennett v. Bennett*, 10 Ch. Div. 474; and distinguishing *Sayre v. Hughes*, L. R. 5 Eq. 376; *Batstone v. Salter*, L. R. 10 Ch. App. 431.

(*v*) *Lewin on Trustees*, 136; *Tumbridge v. Care*, 19 W. R. 1047; but see *Devoy v. Devoy*, 3 Sm. & Giff. 403.

(*w*) 32 Beav. 370.

(*x*) *Lewin on Trustees*, 144; and see *Lloyd v. Pughs*, L. R. 8 Ch. App. 88.

(*y*) *Lamplugh v. Lamplugh*, 1 P. Wms. 113.

the son, although they could not be used by the father against the son (x); and the better opinion seems to be, that the subsequent acts and declarations of the son can be used against him by the father, where there is nothing showing the intention of the father at the time of the purchase sufficient to counteract the effect of those declarations (a). For example, the presumption of advancement will not be rebutted by the mere circumstance that the father retains the property under his control, or that he receives the rents and profits, or interest, even though the son were no longer an infant (b).

(2.) Resulting trust of unexhausted residue. A (2.) Resulting trust of unexhausted residue. very common case of resulting trust arises where a settlor conveys property on trusts which do not exhaust the whole property; in that case, as to so much of the property respecting which no trust is declared, there will be a resulting trust in favour of the settlor (c); and if he is dead, then as regards the realty in favour of his heir or residuary devisee, and as regards the personalty in favour of his next of kin or residuary legatee; and the same rule would apply to a testator giving property by will (d).

It is a leading rule with regard to resulting trusts, where property is given simply upon trust, that the trustee is excluded by that fact from taking beneficially, in case of failure of the whole or part of the purpose for which the trust was directed (e). Thus, in *King v. Denison* (f), in exemplifying the difference

Trustee cannot generally take beneficially.

(a) *Reddington v. Reddington*, 3 Ridg. P. C. 195, 197.

(b) *Sidmouth v. Sidmouth*, 2 Beav. 455; *Scawin v. Scawin*, 1 Y. & C. C. 65.

(c) *Sidmouth v. Sidmouth*, 2 Beav. 447; *Grey v. Grey*, 2 Swanst. 594; *Williams v. Williams*, 32 Beav. 370. Distinguish *Done v. Pollard*, 24 Beav. 283.

(d) Compare *In re Corbishley's Trust*, 14 Ch. Div. 846.

(e) 2 Sp. 225, 226.

(f) 1 Ves. & Bea. 272.

Devise with a charge.—devisee takes beneficially.  
Devise on trust,—devisee takes no benefit.

between a gift on trust and a gift vesting the beneficial interest in the donee, the judgment says,—“If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose alone. If the devise is on trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of these two modes involves just this difference; the former is a devise of an estate for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose with no intention to give him any beneficial interest; where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intention to give to the donee of the legal estate the beneficial interest, if the whole is not exhausted by the particular purpose, the surplus goes to the devisee, as it is intended to be given to him.”

Death of settlor or *cestui que trust* intestate and without representatives.

But suppose that a trust of property having been created does not exhaust the whole of it, and there is no one in whose favour the trust can result, *i.e.*, that as to realty the owner dies intestate and without heirs, and as to personalty he dies intestate and without any next of kin—who takes the property in each of these cases,—the crown or the trustee?

As to realty, trustee takes beneficially, because, if trustee seised in fee, there is no escheat.

As to realty, in *Burgess v. Wheate* (y), A. being seised in fee *ex parte paternâ*, conveyed real estate to trustees, in trust for herself, her heirs, and assigns, to the intent that she should appoint, and for no other

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(y) 1 Eden, 177; and see *In re Van Hagen, Sperling v. Rochfort*, 16 Ch. Div. 18.

use whatsoever. A. died without having made an appointment, and without any heirs *ex parte paternâ*; it was held (under the old law) that the maternal heir was not entitled, and that there being a terre-tenant, the holder of the legal estate, the crown claiming by *escheat*, which arises only where the legal estate is without an owner, had no right to a conveyance of the land, and that the trustees, therefore, took beneficially. On the same principle, where a mortgage *in fee* is made, and the mortgagor dies intestate and without heirs, the equity of redemption does not escheat, but belongs to the mortgagee, subject to the mortgagor's debts (*h*), and subject, of course, to his widow's right of dower, if he have left a widow.

So also where mortgagee seized in fee.

As to personalty, the rule is very different. Under the circumstances stated, the Crown, by virtue of its prerogative, may claim it as *bona vacantia* (*i*). But where the executor is executor simply, and not also a trustee by express creation of the testator, then it appears that in such a case the executor may take or keep beneficially the unexhausted residue (*j*).

As to personalty, the Crown takes as *bona vacantia*.

Before the statute 1 Will. IV., c. 40, where a testator made no express disposition of the residue of his personal estate, the executors were at law entitled to such residue; and courts of equity so far followed the law as to hold the executors to be entitled to retain such residue for their own use, unless it appeared to have been the testator's intention to exclude them from the beneficial interest therein, in which latter case they were held to be trustees for the person or persons who would have been entitled to such estate under the statute of distributions, if the testator had

Executors took undisposed-of residue before 1 Will. IV., c. 40. Except where excluded by testator's intention, express or implied.

(*h*) *Beale v. Symonds*, 16 Beav. 406.

(*i*) *Taylor v. Haygarth*, 14 Sim. 8; *Middleton v. Spicer*, 1 Br. C. C. 201; *In re Gorman*, 15 Ch. Div. 67.

(*j*) See *Lewin on Trustees*, 50; *Roose v. Chalk*, W. N., 1880, p. 145.

died intestate. And equity laid hold of any circumstance or expression in the will which might appear to rebut the presumption of a gift to the executors, and so converted them into trustees. Thus, the intention to exclude the executor from taking beneficially was inferred from an express legacy being given to the executor, or where *equal* legacies were given to the executors, if more than one, but not if unequal legacies were given them (*k*).

(3.) Executors now trustees for representatives of deceased.

(3.) The last-mentioned statute, however, by way of furthering the views of courts of equity, enacts that as to wills made after the 1st September 1830, the executors shall be deemed by courts of equity to be trustees for the persons (if any) who would be entitled, under the statute of distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will that the executors are intended to take such residue beneficially. Whereas before the statute the presumption was in favour of the executors, after the statute the onus has been shifted on them of proving that the testator intended them to take beneficially (*l*), —that is to say, as against the next of kin; for in such a case, the original presumption in favour of the executor would remain *as against the Crown* (*m*).

(4.) Resulting trusts under the doctrine of conversion.

(4.) Resulting trusts arising under the operation of the doctrine of conversion are another important group of implied trusts; they are fully considered in Chap. ix., *infra*, to which chapter the reader is referred.

(5.) Implied trusts arising out of joint-tenancies.

(5.) Implied trusts arising out of joint-tenancies remain to be considered. It is well known that according to the maxim, "Equity follows the law,"

(*k*) *Lynn v. Beaver*, T. & R. 63; *Blinkhorn v. Feast*, 2 Ves. Sr. 26.

(*l*) *Harrison v. Harrison*, 2 H. & M. 237.

(*m*) See Lewin on Trustees, 50; *Rosse v. Chalk*, W. N., 1880, p. 145.

limitations which confer an estate in joint-tenancy at law have the same effect in equity, when there are no circumstances which afford grounds for a departure from the rule of law; so that where two or more persons purchase lands, and advance the money in *equal* shares, and take a conveyance to themselves and their heirs, they will be joint-tenants in equity as well as at law, and upon the death of one of them the estate will go to the survivor (n). But equity, acting on the broad principle that equality is equity, leans strongly against joint-tenancy, with its one-sided right of survivorship: for though it is true that each joint-tenant may have an equal chance of being the survivor, and thus taking the whole, yet this is but an equality in point of chance: as soon as one dies there is an end to the equality between them; on that event the whole accrues to the survivor. And the equal certainty of having an absolute equal share, or a share proportionate to the amount of the purchase-money advanced, is considered the far higher and truer equity than an equal chance of having the whole or none of the property purchased (o). Joint-tenancy not being favoured in equity, courts of equity will therefore lay hold of almost any circumstances from which it can reasonably be implied that a tenancy in common was intended, and will treat the surviving joint-purchaser as a trustee for the legal representatives of the deceased purchaser. Thus:—

Equity leans against survivorship in joint-tenancy.

Slight circumstances defeat survivorship.

(a.) Where two or more persons purchase lands and advance the purchase-money in *unequal* proportions, and this appears on the deed itself, this makes them in the nature of partners; the survivor will be deemed in equity a trustee for the other, in proportion to the

(a.) Advance of purchase-money unequally.

(n) Litt. s. 280.

(o) *Rigden v. Vallier*, 2 Ves. Sr. 258.

sum advanced by him (*p*); and where the purchase-moneys are advanced in *equal* proportions, it is only because, and only when, equity can find no sufficient circumstance of difference, that she reluctantly permits the survivorship-incident of joint-tenancy to have its way.

(b.) Joint-mortgage.

(b.) Where money is advanced by way of loan either in *equal* or in *unequal* shares, by persons who take a mortgage to themselves jointly, in equity there will be a tenancy in common, and no survivorship (*q*).

(c.) No survivorship in commercial purchases.

(c.) The same rule is uniformly applied to joint purchases in the way of trade, and for purposes of partnership, and for other commercial transactions, by analogy to, and in expansion and furtherance of, the great maxim of the common law :—*Jus accrescendi inter mercatores pro beneficio commercii locum non habet* (*r*).

(d.) Land devised in joint-tenancy to partners.

X

(d.) Where, however, land is not purchased by, but is devised to, two persons as joint-tenants, and they make no use of it for partnership purposes, they will not be held tenants in common in equity, unless they should have subsequently agreed so to hold, so as to exclude the incident of survivorship; but if it can be inferred from their mode of dealing with the property for a long period of time (*s*), *e.g.*, if they have used it for partnership purposes or have classed it in their yearly and other accounts as *portion of the assets of the partnership*, then indeed the general rule will apply, and the right of survivorship will be excluded.

(p) *Lake v. Gibson*, 1 L. C. 198.

(q) *Morley v. Bird*, 3 Ves. 631; *Robinson v. Preston*, 4 K. & J. 505.

(r) *Lake v. Gibson*, 1 L. C. 198; *Jeffereys v. Small*, 1 Vern. 217.

(s) *Jackson v. Jackson*, 9 Ves. 591; *Morris v. Barrett*, 3 You. & J. 384; *Davies v. Games*, W. N. 1879, p. 145.

## CHAPTER V.

## CONSTRUCTIVE TRUSTS.

A CONSTRUCTIVE trust, as distinguished from both express and implied trusts, may be defined to be a trust which is raised by construction of equity, without reference to any intention of the parties, either expressed or presumed.

The following are the principal instances of constructive trusts, viz. :—

(1.) The Equitable Lien,—in which the doctrine of constructive trusts receives its most frequent illustrations. This lien is not a *jus in re*, nor yet is it merely a *jus ad rem*; but it is a *charge* upon the thing, and a charge in the view only of a court of equity, being in that respect unlike a legal charge which issues out of, and is in fact part and parcel of, the land. (1.) Equitable liens.

(a.) "Where the vendor conveys, without more, though the consideration is upon the face of the instrument, and by a receipt endorsed upon it, expressed to be paid, if it is the simple case of a conveyance, the money, or part of it, not being paid as between the vendor and vendee, and persons claiming as volunteers, upon the doctrine of this court . . . though perhaps no actual contract has taken place, a lien shall prevail, in the one case, for the whole consideration; in (a.) Vendor's lien for unpaid purchase-money.



"the other, for that part of the money which was not  
"paid" (a).

Waiver or  
abandonment.

Lien not lost  
by taking a  
collateral se-  
curity *per se*.

As to what amounts to a waiver or abandonment of the lien, the general rule is this,—that the abandonment by the vendor of his lien is to depend, not upon the circumstances of his taking a security, but upon the nature of the security which he takes, as amounting to evidence or declaration plain of a purpose to rely upon that security and no longer upon the estate; and the abandonment may also arise upon the ground of circumstances which evidence an intention to look merely to the personal credit of the individual (b).

True rule,—  
was the bond,  
&c., substitu-  
tive of, or  
only cumula-  
tive with, the  
lien?

It is settled that a mere personal security for the purchase-money, *e.g.*, a bond (c), or a bill, or a promissory-note (d), will not *per se* evidence an intention on the part of the vendor to waive his lien over the estate. On the other hand, although the mere giving of a bond, bill, promissory note, or covenant for the purchase-money, or the granting of an annuity, secured by bond or covenant (e), will not of itself be sufficient to discharge the equitable lien, yet where it appears that the note, bond, covenant, or annuity was *substituted* for the consideration-money, or was, in fact, the consideration bargained for, the lien will be lost. Thus, in *Buckland v. Pocknell* (f), A. agreed to sell an estate to B. for an annuity of £200, to be paid to him for life, and an annuity of £92, to be paid after his decease to his son, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuities to

*Buckland v. Pocknell*,—a case of substitution.

(a) Per Lord Eldon in *Mackreth v. Symmons*, 1 L. C. 330.

(b) *Mackreth v. Symmons*, 1 L. C. 334.

(c) *Collins v. Collins*, 31 Beav. 346.

(d) *Hughes v. Kearney*, 1 Sch. & Lefr. 134.

(e) *Clarke v. Royle*, 3 Sim. 499.

(f) 13 Sim. 406; and see *Parrot v. Swetland*, 3 My. & K. 655; *Nives v. Nives*, 15 Ch. Div. 649.

A. and his son, and covenanted to pay them; and by a conveyance of even date, but executed after the annuity deed, after reciting the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in consideration of the premises *and of the annuities having been so granted* as thereinbefore recited, and of the payment of the mortgage-money, conveyed the estate to B. Upon the death of A., his son's annuity, which had been assigned to the plaintiff, became in arrear. Vice-Chancellor Shadwell held that there was no lien for the annuity; but that (in effect) the sale had been made, not in consideration of the *two annuities*, but in consideration of *the deed granting the two annuities*; and as the vendors had got that deed, they had got all that they bargained for. And so also, if lands are sold in consideration of £3000 in cash and the purchaser's promissory-note for £3000 more, it is clear that the vendor has no lien when the £3000 cash and the £3000 note are respectively paid and given; but if the lands had been sold in consideration of £6000, to be paid as follows, that is to say, by £3000 cash and by promissory-note for £3000 more, there the lien for the amount of the £3000 note would have remained a good and valid lien upon the lands, and taking the promissory-note would have been no abandonment thereof (g).

When the vendor has a lien against the vendee for unpaid purchase-money, the lien binds the estate in the hands of the following individuals, viz. :—

1. The purchaser himself, and his heirs, and all persons taken under him or them as volunteers (h). Against whom the lien may be enforced.

2. Subsequent purchasers for valuable consideration

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(g) *Dixon v. Gayfer*, 21 Beav. 118; *Dyke v. Rendall*, 2 De G. M. & G. 209; *In re Brentwood Brick and Coal Co.*, L. R. 4 Ch. Div. 562.

(h) *Mackreth v. Symmons*, 1 L. C. 357.

who bought *with notice* of the purchase-money remaining unpaid (i); for notice, as we have seen, binds the conscience of the party to satisfy all prior equities subsisting against the estate. And even where the first purchaser has sold the estate to a *bond fide* second purchaser without notice, if the second purchase-money or part thereof has not been paid, the original vendor may proceed either against the estate for his lien, or against the second purchase-money remaining in the hands of such second purchaser for satisfaction; for, in such a case, the latter, not having yet paid his money, and getting notice of the lien before he pays it, becomes, in fact, a purchaser *with notice*, and with the usual consequence, viz., he takes the estate *cum onere* to the extent of the unpaid portion of the original purchase-money. And this proceeds upon a general ground, that where trust-money can be traced, it may be followed and applied to the purposes of the trust (j).

3. The assignees, i.e., trustee in bankruptcy, although they may have had no notice of the lien; for the assignees, i.e., trustee in bankruptcy, take subject to all the equities attaching to the bankrupt (k).

4. If the legal estate be outstanding, then, as the second purchaser for value, whether with or without notice, has only an equitable interest, he will in general be postponed to the equitable lien, which comes earlier in date, in accordance with the maxim, "*Qui prior est tempore potior est jure.*"

On the other hand, the lien will not prevail against

(i) *Walker v. Preswick*, 2 Ves. Sr. 622; *Hughes v. Kearney*, 1 Sch. & Lefr. 135; *Morris v. Chambers*, 29 Beav. 246.

(j) *Lench v. Lench*, 10 Ves. 511; and compare *Ex parte Golding Davis & Co., In re Knight*, 13 Ch. Div. 628.

(k) *Ex parte Hanson*, 12 Ves. 349; *Fawell v. Heelis*, Amb. 724.

a *bond fide* purchaser for valuable consideration without notice, who has the legal estate in him (*l*), for here the maxim applies,—“Where the equities are equal the law shall prevail.”

Against whom  
the lien is not  
enforced.

And even where neither party has the legal estate, the first vendor may find his lien postponed through his own negligence. Thus in *Rice v. Rice* (*m*), certain leaseholds were assigned to a purchaser by a deed, which recited the payment of the whole purchase-money, and which had the usual receipt endorsed on it; the title-deeds were delivered up to the purchaser. Some of the vendors received no part of their share of the purchase-money, having allowed the payment to stand over for a few days, on the promise of the purchaser then to pay. The day after the execution of the deeds, the purchaser deposited the assignment and title-deeds with the defendants, with a memorandum of deposit to secure an advance, and then absconded without paying either the unpaid vendors or the equitable mortgagees. It was held, that the defendants, the equitable mortgagees, although having only an equity, and although being posterior in point of date, were entitled to payment out of the estate in priority to the claim of the unpaid vendors for their lien, on the ground that the vendors had lost their priority by their own negligence, having executed and delivered to the purchaser a conveyance by which they declared both in the body of the deed and by a receipt endorsed thereon, that the whole purchase-money had been paid; they had in effect by their own acts assured the mortgagee that so far as they (the vendors) were concerned, the mortgagor had an indefeasible title both at law and in equity (*n*).

Vender may  
lose his lien  
by negligence,  
—*Rice v. Rice*.

(*l*) *Cator v. Pembroke*, 1 Bro. C. C. 302.

(*m*) 2 Drew. 73.

(*n*) *Wilson v. Keating*, 4 De G. & Jo. 588; and see Conveyancing Act, 1881 (44 & 45 Vict., c. 41, s. 55).

(b.) Vendee's  
lien for pre-  
maturely paid  
purchase-  
money.

(b.) Corresponding to the lien of the vendor for his unpaid purchase-money is the lien of the vendee upon the estate in the hands of the vendor for the whole or part of his purchase-money prematurely paid (o); and this lien will exist not only as against the vendor, but also as against a subsequent mortgagee who had notice of the payments having been made (p), and in fact generally against all the like persons above enumerated, against whom the vendor's lien would prevail.

(2.) Renewal  
of lease by  
trustee in his  
own name.

(2.) Another common instance of a constructive trust arises upon the renewal of leases; the invariable rule being that a lease renewed by a trustee or executor in his own name and professedly for his own benefit, although without fraud, and even upon the refusal of the lessor to grant a new lease to the *cestui que trust*, shall be held upon trust for the person entitled to the old lease (q). And this rule is applicable also to persons having a limited interest in a renewable lease as a tenant for life: if he renews it in his own name he will be held a trustee for those entitled in remainder (r). And the reason of this rule is obvious, that it is but fair, if a tenant for life, acting upon the goodwill that accompanies the possession, gets a more durable term, that he should hold it for the benefit of those in remainder (s). So likewise, if a partner renew a lease of the partnership premises on his own account, he will, as a general rule, be held a trustee of it for the firm (t), and the like rule applies to all persons occupying a fiduciary or quasi-fiduciary relation; and

Or by tenant  
for life.

Or partner.

(o) *Wythes v. Lee*, 3 Drew. 396; *Turner v. Marriott*, L. R. 3 Eq. 744.

(p) *Watson v. Rose*, 10 W. R. 745, 10 Ho. L. Ca. 672.

(q) *Keech v. Sandford*, 1 L. C. 46; *In re Morgan*, *Pilgrem v. Pilgrem*, 18 Ch. Div. 93.

(r) *Mill v. Hill*, 3 H. L. Cas. 828; *Yem v. Edwards*, 1 De G. & Jo. 598.

(s) *James v. Dean*, 15 Ves. 236.

(t) *Featherstonhaugh v. Fenwick*, 17 Ves. 311; *Olegg v. Fishwick*, 1 Mac. & G. 294; *Bell v. Barnett*, 21 W. R. 119.

also generally to all varieties of property, and not merely to leaseholds (u).

(3.) A constructive trust may also arise where a person who is only part owner, acting *bond fide*, permanently benefits an estate by repairs or improvements; for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improvements (v). Thus it was intimated in *Neesom v. Clarkson* (w), that although a person expending money by mistake upon the property of another has no equity against the owner who was ignorant of and did not encourage him in his expenditure (x), yet if it were necessary for the true owner to proceed in equity, he would only be entitled to its assistance according to the ordinary rule, by doing equity and making compensation for the expenditure, so far, of course, and only so far, as the expenditure was necessary, and has proved permanently beneficial. But a person will have no equity who lays out money on the property of another with full knowledge of the state of the title (y); or who lays out money unnecessarily and fancifully, extravagantly or improperly.

(3.) Allowance for payments where same are necessary and permanently beneficial.

R.S.O.  
100  
He who seeks equity must do equity.

So again, where a tenant for life, under a will, has gone on to finish permanently beneficial improvements to an estate which had been begun by the testator, courts of equity have deemed the expenditure a charge for which the tenant is entitled to a lien (z). Thus, in *Dent v. Dent* (a), where a tenant for life had expended on the estate large sums,—(1) In completing a mansion-house, left unfinished by the testatrix; (2) In erecting

Improvements by tenant for life.

(u) *Pole v. Pole*, 2 De G. & Sm. 420; *Cooper v. Phibbs*, L. R. 2 Ho. Lo. 149.

(v) *Lake v. Gibson*, 1 L. C. 198.

(w) 4 Hare, 97.

(x) *Nicholson v. Hooper*, 4 My. & Cr. 186.

(y) *Rennie v. Young*, 2 De G. & Jo. 136; *Ramsden v. Dyson*, L. R. 1 H. L. 129.

(z) *Hibbert v. Cooke*, 1 Sim. & Stu. 552.

(a) 30 Beav. 363; and see *In re Leslie's Settlement Trusts*, L. R. 2 Ch. Div. 185.

a conservatory and vinery; (3) In rebuilding farm-houses, &c.; (4) In erecting cottages; (5) In erecting permanent furnaces, works, buildings, &c., at some copper-works; (6) In draining marshy ground; and (7) In making payments to keep a foreign mine working so as to prevent its forfeiture;—it was held that he was entitled to no allowance for these sums out of the personal estate of the testatrix held upon similar trusts, or to any inquiry respecting them, excepting those laid out in the 1st and 7th of them, *i.e.*, in completing the mansion, and in keeping up the foreign mine, an inquiry being directed whether the outlay on these two accounts, or either (and which?) of them, was or was not for the benefit of the inheritance (b).

The student may be here reminded, that it was in consequence of such decisions as this one in *Dent v. Dent* that the Improvement of Land Act, 1864 (c), and other subsequent Acts *in pari materia* have been passed, under which the tenant for life, instead of expending his own money in these classes of improvements, expends moneys borrowed from Government for the purpose, and the Acts make the repayment of such moneys a charge upon the lands improved, repayable by instalments (usually twenty-five) by the successive tenants for the time being.

Trustee has a lien on trust-fund for expenses of renewal.

A trustee, executor, or other fiduciary person who has renewed a lease has, however, a lien upon the estate for the costs and expenses of the renewal with interest (d).

Salvage-moneys on policy of insurance.

Similarly where payments have been made in order to prevent the lapse of a policy, the person making

(b) *Dunne v. Dunne*, 3 Sm. & Giff. 22. *In re Leigh's Estate*, L. R. 6 Ch. 887.

(c) 27 & 28 Vict., c. 114; and see the Settled Land Act, 1882.

(d) *Holt v. Holt*, 1 Ch. Ca. 190; *Coppin v. Fernyhough*, 2 B. C. C. 291; and as to renewal fund, see *Maddy v. Hale*, L. R. 3 Ch. Div. 327.

such payments is entitled to a lien for the amount on the proceeds of the policy, on the footing of salvage moneys (e), but apparently to no other beneficial interest in the property.

(4). When a person has a mortgage in fee which he has not foreclosed, the legal estate in the mortgaged premises used to descend, in case of his intestacy, to his heir; but in equity the mortgaged estate being only a security for money, the heir or devisee was held a trustee of the legal estate in the lands for the personal representatives of the deceased mortgagee for the purpose of securing them the mortgage moneys, to hand over or distribute to or among the persons entitled to the personal estate of the mortgagee (f); and now, under the Conveyancing Act, 1881 (g), the executor or administrator may himself reconvey the legal estate, on payment of the mortgage money, and in fact the legal estate now descends under that Act to the personal representatives, whether the deceased mortgagee dies testate or intestate.

(4.) Heir of mortgagee trustee for personal representatives.

Before concluding this chapter, it may be usefully pointed out that the constructive trusts exemplified above are constructed by the court of equity in the following manner:—First of all, Equity asks, Who has got the *legal* estate, *i.e.*, to whom does the property belong at law, apart from all equitable considerations? That matter being once ascertained, the court of equity acknowledges the legal ownership, and without impugning same, welcomes it rather, and makes a foundation of it upon which to build up, that is, to *construct*, the trust for which it perceives an equity. Thus, in the case of the vendor's lien (being Constructive Trust,

Equity's manner of constructing trusts,—explained and illustrated.

(e) *Norris v. Caledonian Insurance Company*, L. R. 8 Eq. 127; *Gill v. Downing*, L. R. 17 Eq. 316.

(f) *Thornbrough v. Baker*, 2 L. C. 1046.

(g) 44 & 45 Vict., c. 45, s. 30.



No. 1, *a, supra*), the court of equity finds the legal estate in the vendee, inasmuch as the vendor has already conveyed same to him; and then the court founds upon the vendee, *as having the legal estate*, the equitable lien or charge for the unpaid purchase-money. So again, in the case of the vendee's lien (being Constructive Trust, No. 1, *b*), the court of equity finds the legal estate in the vendor, inasmuch as he has not yet conveyed same to the vendee; and then the court founds upon the vendor *as still having the legal estate*, the equitable lien or charge for the prematurely paid purchase-money. Similarly, in all the other cases,—it being, in fact, the rule of the court of equity to found upon the legal estate only,—a rule the forgetting or the ignorance of which occasions not only unnecessary difficulty to the student, but oftentimes mistakes in the conduct of actual legal business.

## CHAPTER VI.

TRUSTEES AND OTHERS STANDING IN A FIDUCIARY  
RELATION.

*R.S.O. 1870 c. 110*

A TRUSTEE should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and should (for reasons of convenience) be domiciled within the jurisdiction of the English courts of equity (*a*). A corporation as to lands (*b*), a feme covert (*c*), and an infant (*d*), as to both real and personal estate, are, on account of their several disabilities, unsuited to hold, but none of them are incapable of holding, the office of trustee. Since the Naturalisation Act, 1870 (*e*), an alien is apparently as capable as a native-born person of acting as trustee, even as regards real estate. Who may be trustees.

It is a general rule in courts of equity, that where a trust exists, and there is no trustee to execute it, equity will follow the legal estate, and decree that person a trustee in whom the legal estate is vested (not being a *bona fide* purchaser for valuable consideration without notice, or otherwise entitled to protection) (*f*). For a court of equity never wants a trustee, and Equity never wants a trustee.

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(*a*) Lewin on Trustees, 27.

(*b*) Ibid. 27, 29; and see *Att.-Gen. v. St. John's Hospital*, 2 De G. J. & Sm. 621.

(*c*) *Lake v. De Lambert*, 4 Ves. 595.

(*d*) *Hearle v. Greenbank*, 3 Atk. 712.

(*e*) 33 & 34 Vict., c. 14, s. 2; as to old law, see Gilb. on Uses, 43; *Fisk v. Klein*, 2 Mer. 431.

(*f*) *Thorndike v. Hunt*, 3 De G. & J. 563; *Salisbury v. Bagott*, 2 Swanst. 608.

the beneficial interest therefore is never affected by the want of a trustee; therefore, where property has been bequeathed in trust without the appointment of a trustee; if it is personal estate, the personal representative is deemed the trustee; and if it is real estate, the heir or devisee is deemed the trustee; and in either case, the trustee, whoever he is, is bound to the due execution of the trust. So again the lapse of the legal estate never has the least influence upon the trusts to which it is subject; if the individuals named as trustees fail either by death, or by being under disability, or by refusing to act, the court will provide a trustee; if no trustees are appointed at all, the Court of Chancery assumes the office in the first instance; for generally if the trust cannot be executed through the medium which was in the primary view of the testator, it shall be executed through the medium appointed by the Court of Chancery.

In what sense the trustee is the servant, and in what sense the controller, of his *cestui que trust*.

The trustee is, in fact, a mere machine, but a machine that acts according to the rules of equity, and departs therefrom at his own particular peril, although at the same time he is the servant of his *cestui que trust* for the time being. By "*cestui que trust*" is here meant, not one person having only a partial beneficial interest in the trust fund,—for the trustee is not the servant but the controller of such partiairy or partial beneficiary,—but the aggregate body of persons (born and unborn) that make up the entirety of the persons entitled, or who may be or become entitled, to any beneficial interest in the trust property as such (g). And even a majority of the *cestuis que trustent* may, e.g., upon the total failure of the objects for which the trust money was subscribed, demand back the trust money (h); also the person for whom

(g) *Morgan v. Swansea U. S. Authority*, 9 Ch. Div. 582, per Jessell, M.R.

(h) *Wilson v. Church*, 13 Ch. Div. 1.

the trustee shall be a trustee depends entirely upon the will of such *cestui que trust*, whether entitled under the original creation of the trust, or by subsequent devolution or transfer, for he may assign his beneficial interest without the consent of the trustee (i).

The *cestuis que trustent*, or any one or more of them, are entitled to file a bill against the trustee, to compel him to the execution of any particular act of duty; also, if any *cestui que trust* has reason to suppose, and can satisfy the court, that the trustee is about to proceed to an act not authorised by the true scope of the trust, he may obtain an injunction from the court to restrain the trustee from such wrongful exercise of his legal power (j). A trustee who has accepted the trust cannot afterwards renounce it; also, upon the death of one trustee, the entire responsibilities survive to the other trustees or trustee (k); and the only mode in which a trustee could obtain a release from his responsibilities used to be either under the sanction of a court of equity, or by virtue of a special power in the instrument creating the trust, or with the consent of all parties interested in the estate, being *sui juris* (l), of these three modes of release, the second one being usually the only one unattended with serious expense; for as regards the first mode of release, the court would not sanction the release merely because the trustee wished it; and as regards the third mode of release, it was rarely, if ever, the certain fact that all the *cestuis que trust* were *sui juris*, or even yet in existence. But now, under the Conveyancing Act, 1881 (m), a trustee may be compelled to any act of duty; Or restrained from abuse of his legal title. Trustee cannot renounce after acceptance.

(i) 2 Sp. 876; *Att.-Gen. v. Downing*, Wilm. 23; *Donaldson v. Donaldson*, Kay, 711.

(j) *Balls v. Strutt*, 1 Hare, 146; Lewin on Tr. 613.

(k) *Att.-Gen. v. Gleg*, 1 Atk. 356; and compare *Cooke v. Crawford*, 13 Sim. 91; *Osborne v. Rowlett*, 13 Ch. Div. 774; and see Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 38.

(l) *Manson v. Baillie*, 2 Macq. H. L. Cas. 80; Lewin on Tr. 204.

(m) 44 & 45 Vict., c. 41, s. 32.

4. tee may by deed retire from the trust, provided two trustees remain, and these two trustees and the person entitled to appoint others express by the deed their consent to his retirement.

Trustee cannot delegate his office.

The office of trustee being one of personal confidence, cannot be delegated. Trustees who take on themselves the management of property for the benefit of others, have no right to shift their duty on other persons, and if they do so, they remain subject to responsibility towards their *cestui que trust* for whom they have undertaken the duty (n). The incapacity of the trustee to delegate his office is to be understood of a trustee being and remaining one; because of course under a special power in that behalf or otherwise he may retire altogether from the trust with or without appointing a new trustee in his place, and in that way delegate (in one sense) the entire trust. But the trustee who does not resign altogether cannot delegate in part, for the reasons stated, and upon the maxim, "*delegatus non potest delegare*," which although ridiculed by Bentham as a "fallacy of rhythm," is based and maintained in English law upon sound and enduring reasons.

Delegation permitted where there is a moral necessity for it.

But trustees and executors may justify their administration of the trust fund by the instrumentality of others, where there exists a moral necessity for it. Necessity, which includes the *regular course of business*, will exonerate. Thus, if "an executor living in London is to pay debts in Newcastle, and remits money to his co-executor to pay those debts, he is considered to do this of *necessity*; he could not transact business without trusting some person, and it would be impossible for him to discharge his duty if he is made responsible

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(n) *Turner v. Corney*, 5 Beav. 517; *Bostock v. Floyer*, L. R. 1 Eq. 26; *Eaves v. Hickson*, 30 Beav. 136.

when he remitted money to a person to whom he would on the like occasion have himself given credit, and would in his own business have remitted money in the same way" (o).

Trustees (whether or not being also executors) are bound to take in all cases the same care of the trust property as a man of ordinary caution would take of his own; and if they have done so, they will not be liable for any *accidental* loss; as, for instance, by a robbery of the property while in their own possession (p), or by a robbery or loss whilst in the possession of others with whom it has necessarily, *i.e.*, in the ordinary course of business, been intrusted (q). But the court, in determining the liability or non-liability of a trustee for any loss sustained by the trust estate, distinguishes between the *duties* imposed upon and the *discretions* vested in him as such. And as regards his *duties*, the utmost diligence in observing same (*i.e.*, *exacta diligentia*) is his only protection against liability for any loss; and it is only as regards his *discretions*, or discretionary powers, that an amount of diligence equal to what he bestows on his own property will protect him from liability. Thus, firstly, as regards *duties*, if a trustee or executor permit the trust fund to remain unnecessarily, or contrary to his duty, in the hands of third parties,—as, for instance, if money be left in the hands of a banker more than a year after the testator's death, and after the debts, &c., have been paid (r); or if a trustee mix trust property with his own (s); or parts with his exclusive control over the fund by associating with himself the authority of another person (t); or if

The care and diligence required of trustees, as regards,—

(a.) Duties.

(o) *Joy v. Campbell*, 1 Sch. & Lef. 341; *Clough v. Bond*, 3 My. & Cr. 497; *Ex parte Belchier*, Amb. 219.

(p) *Morley v. Morley*, 2 Ch. Ca. 2.

(q) *Jones v. Lewis*, 2 Ves. 240; *Swinfen v. Swinfen*, 29 Beav. 211.

(r) *Darke v. Martyn*, 1 Beav. 525.

(s) *Lupton v. White*, 15 Ves. 432.

(t) *Salway v. Salway*, 2 Russ. & My. 215.

(b.) Discre-  
tions.

the fund be left to the entire control of a co-trustee (u), —it will be at his risk (v). But, secondly, as regards *discretions*, e.g., if, under the investment clause in the will or settlement, he has the power of investing in any one or more at his discretion of certain specified funds comprising good, bad, and indifferent securities, and he invests (say, at the request of an importunate *cestui que trust*) part of the trust funds in Turkish Bonds, as being one of the authorised investments, then he will be liable, if he would not have invested his own moneys in that class of investment; but otherwise he will not be liable, even in the case of a loss to the trust estate (w). And even a simple executor or an administrator is a trustee within the meaning of this distinction, and will be liable accordingly for any breach of what the court considers his *duty*, notwithstanding that he has used all ordinary care (x).

No remunera-  
tion allowed  
to trustee.

It is an established rule that trustees, executors, or administrators, or others standing in a similar situation, shall have no allowance for their care and trouble, and this proceeds upon the well-known principle of equity, that a trustee shall not profit by his trust (y). So strict is this rule, that although a trustee or executor may, by the direction of the author of the trusts, have carried on a trade or business at a great sacrifice of time, he will be allowed nothing as compensation for his personal trouble or loss of time (z), *scil.* in the absence of any provision in the trust deed or will entitling him to such compensation. And even a solicitor, who is a trustee, is not entitled to

Solicitor-trus-  
tee allowed  
only for costs  
out of pocket.

(u) *Clough v. Bond*, 3 My. & Cr. 490.

(v) *Castle v. Warland*, 32 Beav. 660; *Lunkham v. Blundell*, 27 L. J. Ch. 179; *Matthews v. Brise*, 6 Beav. 239; 22 & 23 Vict., c. 35, s. 31.

(w) *Tabor v. Brooks*, 10 Ch. Div. 273; *In re Norrington, Bindley v. Partridge*, W. N. 1879, 37.

(x) *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. Div. 236, following *Clay v. Rufford*, 5 De G. & Sm. 768.

(y) *Robinson v. Pett*, 2 L. C. 207; *Hamilton v. Wright*, 9 Cl. & F. 111.

(z) *Brocksopp v. Barnes*, 5 Mad. 90.

charge for business done by him in relation to the trust, except for his costs out of pocket only, unless there is in the deed or will a provision enabling him to receive remuneration for the transaction of such business (a); and even where a solicitor is appointed executor or trustee, and according to the will he is to be "at liberty to charge for professional services," he can only charge for services strictly professional, and not for matters which an executor or trustee ought to have done without the intervention of a solicitor, such as for attendances to pay premiums on policies, or at the bank to make transfers, &c. (b),—wherefore the will or settlement should give to the solicitor-trustee a wide liberty in this respect, extending as well to professional business as also to business in and about the trust although not strictly professional.

Although trustees or executors will not in general be entitled to any allowance for their trouble, there is nothing however to prevent them contracting with the *cestui que trust* to receive some compensation for the performance of the duties of the trust. But such a contract would be very jealously scrutinised by a court of equity, and if there be any appearance of unfairness or unconscionable advantage on the part of the trustee, the agreement will not be enforced (c).

Trustees may stipulate to receive compensation.

In further illustration of the maxim that a trustee shall not make a profit by his trust, may be mentioned those cases where one in a fiduciary position uses that position as a means of obtaining any profit or advantage which he would not otherwise obtain. It was upon this principle that Lord Eldon in one case directed an inquiry whether the liberty of sporting over the trust estate could be let for the benefit of the

Trustee must not take any advantage out of his trust.

(a.) Not enjoy the shooting.

(a) *Broughton v. Broughton*, 5 De G. M. & G. 160.

(b) *Harb'n v. Darby*, 28 Beav. 325.

(c) *Ayliffe v. Murray*, 2 Atk. 58.



*cestui que trust*, and in the meantime the trustee was to appoint a gamekeeper for the preservation of the game, but was not himself to enjoy the shooting (*d*).

(b) Not charge more than he gave for the purchase of debts.

If trustees or executors buy up any debt or encumbrance to which the trust estate is liable, for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the creditors or legatees, or other *cestuis que trust*, shall have the advantage of it (*e*).

(c.) Not take trade profits, paying interest instead.

Again, if a trustee or executor use the fund committed to his care in buying and selling land, or in stock speculations, or lay out the trust money in a commercial adventure, as in fitting out a vessel for a voyage, or if he employ it in business, in all these cases, while the executor or trustee is liable for all losses, the *cestui que trust* may insist either on having the trust fund replaced with interest, or on having the profits made by the trust funds so employed (*f*).

Trustee cannot renew lease in his own name;

Or purchase trust estate.

So likewise a person standing in a fiduciary relation towards another will not be allowed to benefit by his trust by obtaining a renewal of a lease in his own name, but will be deemed in equity to be a trustee for those interested in the original term (*g*); nor will a trustee, as a general rule, be permitted to purchase the trust estate from his *cestui que trust* (*h*).

Same principles apply to agents, &c.

The foregoing principles apply to constructive trustees, as agents (*i*), guardians (*j*), partners (*k*),

(d) *Webb v. Earl of Shaftesbury*, 7 Ves. 480-488.

(e) *Pooley v. Quiller*, 4 Drew. 184, 2 De G. & Jo. 327; *Fosbrooke v. Balguy*, 1 My. & K. 226.

(f) *Docker v. Somes*, 2 My. & K. 655; *Townend v. Townend*, 1 Giff. 201; *Willett v. Blansford*, 1 Hare, 253.

(g) *Keech v. Sandford*, 1 L. C. 46.

(h) *Fox v. Mackreth*, 1 L. C. 123.

(i) *Morret v. Paske*, 2 Atk. 54; *Kimber v. Barber*, L. R. 8, Ch. 56; *Macpherson v. Watt*, 3 App. Ca. 254.

(j) *Powell v. Glover*, 3 P. W. 252 n.

(k) *Wedderburn v. Wedderburn*, 4 My. & Cr. 41.

directors of companies (*l*), and even promoters of companies (*m*), and generally to all persons clothed with a fiduciary character. All such persons must refund all profits improperly made at the expense of the trust estate, and will not be allowed, as a general rule, any remuneration for their trouble (*n*); and a summary remedy under the Companies' Act, 1862, s. 165 (*o*), is provided against directors in the event of the winding up of the company, and they are thereby made liable for their misfeasances, *i.e.*, breaches of trust (*p*).

However, under exceptional circumstances, trustees and other persons standing in the like fiduciary relation may effectively and securely purchase from their *cestuis que trustent*, *e.g.*, (1) If the trustee will give more for the trust estate than any other purchaser, in other words, if he will give a "fancy-price" for it; or (2) If the offer to sell proceeds from the *cestuis que trustent*, and the trustee pays the ordinary value in the market, keeping (as it is said) his *cestuis que trustent* at arm's length; or (3) If the sale is by public auction, and the trustee has the leave of the court to bid,—then, and in any of these cases, the purchase by the trustee will in general hold good (*q*).

Exceptional cases, in which trustees' purchase from *cestui que trust* holds good.

But if a person is merely a constructive trustee, his liabilities are in some respects different from those of an express trustee. His duties and responsibilities are in general matters of quasi-contract, and he is therefore not bound by many of the rules which equity has

Constructive, not liable to same extent as express trustee.

(*l*) *Great Luxembourg Rail. Co. v. Magnay*, 25 Beav. 586.

(*m*) *Bagnall v. Carlton*, 6 Ch. Div. 371; *New Sombbrero Co. v. Erlanger*, 5 Ch. Div. 73, 3 App. Ca. 1218; *Emma Silver Mining Co. v. Lewis*, 4 C. P. D. 396; *Whaley Bridge Printing Co. v. Green*, 5 Q. B. D. 109.

(*n*) *Docker v. Somes*, 2 My. & K. 665; *Foster v. M'Kinnon*, 5 Gr. 510; *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189.

(*o*) 25 & 26 Vict., c. 89.

(*p*) *Metcalf's Case*, 13 Ch. D. 170; following *De Ruvinne's Case*, 5 Ch. D. 306; and *Pearson's Case*, 5 Ch. Div. 336.

(*q*) *Hickley v. Hickley*, L. R. 2 Ch. Div. 190.

Remarks of  
Lord West-  
bury in *Knox*  
v. *Gye*.

Time runs in  
favour of con-  
structive  
trustee, al-  
though not  
in favour  
of express  
trustee.

Constructive  
trustee may  
have remun-  
eration for  
time and skill.

annexed to the express fiduciary relation. Thus, in *Knox v. Gye* (r), where it was attempted to be argued that a surviving partner was a trustee of the share of his deceased partner, Lord Westbury, after adverting to the case of vendor and purchaser, and stating that there, though the vendor might by a metaphor be called a trustee, *he was a trustee only to the extent of his obligation to perform the agreement* between himself and the purchaser, proceeded as follows:—"In like manner, here the surviving partner may be called a trustee for the dead man, but the trust is *limited to the discharge of an obligation, which is liable to be barred by lapse of time*. As between the express trustee and *cestui que trust*, time will not run, but the surviving partner is not a trustee in that full and proper sense. It is most important to mark this again and again, for there is not a more fruitful source of error in law than the inaccuracy of language. The application to a man, who is improperly and by metaphor only called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Macclesfield, that nothing in law is so apt to mislead as a metaphor" (s).

Similarly, where a person is merely a constructive trustee, as having employed the money of another in a trade or business, although he must account for the profits of the money he has employed, he may have an allowance made to him for his loss of time and for his skill and trouble (t).

(r) L. R. 5 H. L. 656, 675; and see *Noyes v. Crawley*, 10 Ch. Div. 31; *Metropolitan Bank v. Heiron*, 5 Exch. Div. 319.

(s) *Taylor v. Taylor*, 28 L. T., N.S. 189; *Edwards v. Warden*, 22 W. R. 669.

(t) *Brown v. Lilton*, 1 P. W. 140; *Brown v. De Tastet*, Jac. 284; *Docker v. Somes*, 2 M. & K. 655.

In *Townley v. Sherborne* (u), the extent of the responsibility of one trustee for the acts or defaults of his co-trustee was first discussed. A., B., C., and D. were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and *signed acquittances*, but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, and which had never come to their hands? After much consideration, the judges resolved:—That where lands are conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dieth or decayeth in his estate, his co-trustees shall not be charged or be compelled in the Court of Chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil-dealing appears to have been in them, to prejudice the trust, for they being by law joint-tenants, or tenants in common, every one by law may receive either all or as much of the profits as he can come by; it is no breach of trust to permit one of the trustees to receive all, or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipt of the profits. But it was also resolved:—That if upon the proof of circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged, though he received nothing (v). And it was, in fact, decided in *Townley v. Sherborne*, that if a trustee joined with his co-trustees in *signing receipts*,

One trustee  
is liable for  
his co-trustee,  
—practically.

1  
2  
3

(u) 2 L. C. 870; and see *Lewis v. Nobbs*, 8 Ch. Div. 591.

(v) *Mucklow v. Fuller*, Jac. 198; *Booth v. Booth*, 1 Beav. 125.

he was liable, even though he had received nothing—the liability arising not from his mere signing of the receipts (because, of course, it was his duty to do that), but *from his subsequently leaving in the hands of his co-trustees the money that had been received* (which, as we have just seen, it was a violation of his duty to do),—such neglect of *duty* amounting to an “evil practice” within the meaning of this case, although there was no moral culpability on the trustee’s part.

“Signing for conformity,”  
—effect of ;  
(1.) By itself alone.

And, in fact, in later times the rule has been established that a trustee who joins in a receipt for conformity, but without receiving, shall not *by that circumstance alone* be rendered liable for a misapplication by the trustee who receives, for “it seems to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him, by his joining in the receipts, is but notional” (*w*). Where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must (according to the present state of the law) be authenticated by the signature of all the trustees in this their joint capacity, and it would be tyranny to punish a trustee for an act which the very nature of his office will not permit him to decline (*x*),—*scil.* where that act is not coupled with any breach of duty arising subsequently. At law, where trustees join in a receipt, *prima facie* all are to be considered as having received the money. But it is competent to a trustee, and, if he means to exonerate himself from that inference, it is necessary for him, to show that the money acknowledged to have been received by all was in fact received by one, and he himself joined only for conformity (*y*). But that means of

(2.) When coupled with subsequent neglect of duty.

(*w*) *Fellows v. Mitchell*, 1 P. W. 81 ; *In re Fryer*, 3 K. & J. 317 ; and see *Brice v. Stokes*, 11 Ves. 319 ; *Hanbury v. Kirkland*, 3 Sim. 265.

(*x*) *Lewin*, 215.

(*y*) *Brice v. Stokes*, 2 L. C. 877 ; 11 Ves. 319 ; and see Conveyancing Act, 1881, s. 36 ; Settled Land Act, 1882, s. 40.

exoneration from subsequent loss is in general of little worth, the subsequent loss commonly proceeding not from the mere signature of the receipt (how could it?), but from a subsequent neglect of *duty* by the non-receiving but signing trustee. For though a trustee is safe if he does no more than authorise the receipt and retainer of the money by his co-trustee, yet he will not be justified in allowing the money to *remain* in his hands for a longer period than the circumstances of the case reasonably require (x); e.g., a fortnight's neglect may occasion all the loss.

Co-executors, on the other hand, are generally answerable each for his own acts only, and not for the acts of their co-executors (a). For in respect of receipts the case of co-executors is materially different from that of co-trustees, and this difference arises not from any principle, but from the different powers with which co-trustees and co-executors are, so far as regards the receipt and application of moneys, respectively invested by the law; for an executor has, independently of his co-executor, a full and absolute control over the personal assets of the testator, and is competent to give valid discharges by his own separate act. If, therefore, an executor join with a co-executor in a receipt, he does an *unnecessary* act, and will therefore be *prima facie* answerable for the application of the fund (b). But this *prima facie* responsibility may be readily got rid of or displaced by evidence that the co-executor who signed in this unnecessary way did not in fact receive. Therefore where, in *Westley v. Clarke* (c), T., one of three executors, had called in a sum of money, secured by mortgage of a term of years, and received the amount, and *afterwards*, but the same day, sent round

One executor not liable for his co-executor,—practically.

Onus on executor joining in receipt to prove that he did not receive.

(x) *Brice v. Stokes*, *ubi sup.*; *Thompson v. Finch*, 8 De G. M. & G. 560; *Walker v. Symonds*, 3 Swanst. 1; *Hambury v. Kirkland*, 3 Sim. 265.

(a) *Williams v. Nizon*, 2 Beav. 472.

(b) *Brice v. Stokes*, 11 Ves. 319.

(c) 1 Eden. 357.

his clerk to his co-executors, with a particular request that they would execute the assignment and sign the receipt, which they accordingly did; and T. afterwards became bankrupt, and the money was lost, and thereupon a bill was filed to charge the co-executors,—Lord Northington said,—“If it plainly appears that only one executor received and discharged the estate indebted, and assigned the security, and the others joined afterwards without any reason and *without being in a capacity to control the act of their co-executor, either before or after the act was done*, what ground has any court of conscience to charge them?” His Lordship was therefore of opinion that the executors were not liable for the misapplication by their co-executor.

True rule as  
to receipts by  
executors.

The true rule is best explained by Lord Redesdale in *Joy v. Campbell* (d),—“The distinction,” he observes, “seems to be this, with respect to mere signing; that if the receipt be given for the purpose of mere form, then the signing will not charge the person not receiving; *but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both*, such a receipt shall charge; and the true question in all these cases seems to have been, *whether the money was under the control of both executors?*” (e).

Indemnity  
clauses,—  
utility of, in  
general.

An express clause is usually inserted in trust deeds that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustees, but for his own acts and defaults only. But equity infuses such a proviso into every trust deed (f), and a person can have no better right from the expression of that which, if not expressed, would be implied (g). And

(d) 1 Sch. & Lef. 341.

(e) *Walker v. Symonds*, 3 Swanst. 1; *Hovey v. Blakeman*, 4 Ves. 608.

(f) *Dawson v. Clarke*, 18 Ves. 254.

(g) *Worrall v. Harford*, 8 Ves. 8; *Rehden v. Wesley*, 29 Beav. 213.

now, by Lord St. Leonards' Act (*h*), every instrument creating a trust shall be deemed to contain the usual indemnity and reimbursement clauses, and therefore, in future, the express introduction of them into deeds and wills may be safely dispensed with. But it is to be noted, of course, that the very generality of the usual indemnity clause augurs it of little worth as a protection, as it does not extend to cover the trustee's neglect of a trustee's *duties*, one of which (as already shown) is not to leave the money in the sole control of his co-trustee.

That being so, it is not unusual to insert in deeds and wills an indemnity clause of somewhat wider reach. Thus, in the case of *Wilkins v. Hogg* (*i*), a testatrix, by her will in 1854, after appointing three trustees, declared each trustee should be answerable only for losses arising from his own default, and not for involuntary acts, or for the acts or defaults of his co-trustees; and particularly *that any trustee who should pay over to his co-trustee, or should do or concur in any act enabling his co-trustee to receive any moneys for the general purposes of her will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered responsible by any express notice or intimation of the actual misapplication of the same moneys.* The three trustees joined in signing and giving receipts to two insurance companies for two sums of money paid by them, but two of the trustees permitted their co-trustee to obtain, and afterwards to retain, the money without ascertaining whether he had invested it. That trustee having misapplied the money, a bill was filed for the purpose of making his co-trustees personally liable. Lord Westbury, C., held that they were not liable. His Lordship said,—“This

*Wilkins v. Hogg*,—example of a very extensive indemnity clause.

(A) 22 & 23 Vict., c. 35, s. 31; and see Settled Land Act, 1882, ss. 41, 42.

(i) 8 Jur. N.S. 25; 3 Giff. 116.



clause excluded the possibility of any liability except for actual misappropriation. There were three modes in which a trustee would become liable according to the ordinary rules of law,—first, where, being the recipient, he

1. hands over the money without securing its due application; secondly, where he allows a co-trustee to receive
2. money without making due inquiry as to his dealing with it; and, thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress.
3. tution or redress. The framer of the clause under examination knew these three rules, and used words sufficient to meet all these cases. There remained, therefore, only personal misconduct, in respect of which a trustee, acting under this will, would be responsible."

Duties of trustees,—  
towards  
securing the  
trust property.

The two primary duties of a trustee are, first, to carry out the directions of the person creating the trust; and, secondly, to place the trust property in a state of security.

(x.) Reduction  
into possession  
or quasi-  
possession.

Thus, if a trust fund be an equitable interest, of which the legal estate cannot at present be transferred to an encumbrancer, it is the trustee's duty to lose no time in giving notice of his own interest to the person in whom the legal interest is vested; for, otherwise, he who created the trust might subsequently encumber adversely the interest he has settled in favour of a purchaser without notice, who, by first giving notice to the legal holder, might gain a priority (*j*). Also, if the trust fund be a chose in action, as a debt which may be reduced into possession, it is the trustee's duty to be active in getting it in, and any unnecessary delay in this respect will be at his own personal risk (*k*).

(*j*) *Jacob v. Lucas*, 1 Beav. 436.

(*k*) *Grove v. Price*, 26 Beav. 103.

An executor or trustee is not to allow the assets of the testator to remain outstanding upon *personal* security, though the debt was a loan by the testator himself on what he deemed an eligible investment (l); and he is not justified in lending on personal security, however good (m). But he may continue such loans, and also make new loans, on personal security, if expressly empowered to do so by the instrument creating the trust (n); and in that case he must only exercise his discretion in a reasonable way.

(2.) Realisation of moneys outstanding on personal security.

In the absence of any express power created by the settlement, and independently of any power which may be given by any statute for the time being in force, trustees, executors, or administrators should invest on mortgages of real estate in England, or in Government securities, or in Consolidated Bank Annuities (o). *Consolidated*

(3.) Investment of trust funds in the authorised securities.

However, by Lord St. Leonards' Act, 22 & 23 Vict., c. 35, s. 32, trustees, executors, and administrators, where not expressly forbidden by the instrument creating the trust, are authorised to invest trust funds on real securities in any part of the United Kingdom, or in the stock of the Bank of England or Ireland, or in the East India Stock (p). Also, by Lord Cranworth's Act, 23 & 24 Vict., c. 145, s. 25, it was enacted that trustees having trust money in their hands which it was their duty to invest at interest, should be at liberty, at their discretion, to invest the same in any of the parliamentary stocks or public funds, or in Government securities, and such trustees should also be

Range of investments authorised by statute for trust moneys.

(l) *Paddon v. Richardson*, 7 De G. M. & G. 563; *Clough v. Bond*, 2 My. & Cr. 496.

(m) *Geaves v. Strahan*, 8 De G. M. & G. 291.

(n) *Paddon v. Richardson*, 7 De G. M. & G. 563.

(o) *Baud v. Fardell*, 7 De G. M. & G. 628; *Ex parte Vicar of St. Mary, Wigton*, 18 Ch. Div. 646.

(p) See 23 & 24 Vict., c. 38, s. 12; also 30 & 31 Vict., c. 132, s. 1, which extends the power of investment to East India Stocks created after the date of 22 & 23 Vict., c. 35; Lewin on Trusts, 252; *In re Wedderburn's Trusts*, 9 Ch. Div. 112.

at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same in any such securities as aforesaid; but no such change of investment as aforesaid should be made (except in the Three per Cent. Consolidated Bank Annuities) where there was a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person. Also, by the statute 30 & 31 Vict., c. 132, s. 2, it is enacted that, except where expressly forbidden by the instrument creating the trust, "it shall be lawful for every trustee, executor, or administrator, to invest any trust fund in his possession or under his control in any securities, the interest of which shall be guaranteed by Parliament." Also, by the statute 34 & 35 Vict., c. 27 (The Debenture Stock Act, 1871), it is enacted that trustees, executors, and administrators, having power to invest trust funds in the mortgages or bonds of any company, shall and may (unless the instrument of trust express to the contrary) invest such funds in the debenture stock of any such company. And under the Settled Land Act, 1882 (45 & 46 Vict., c. 38), s. 21, capital trust money arising under that Act may be invested (speaking generally) in the like securities as those hereinbefore stated to be authorised.

(4.) Conversion of terminable and reversionary property comprised in residuary devise or bequest.

As a general rule, where a testator subjects the residue of his personal estate to a series of limitations directly or by way of trust, without any particular directions as to the investment or mode of enjoyment, there, in the absence of indications of a contrary intention, such part of the residue as may be wearing out (such as leaseholds) must be converted, and put in such a state of investment as to be securely available for all persons interested in it. And if the residue comprises property of a reversionary nature, that

also must be converted. The former of these two rules protects the remainder-man, the latter of them protects the tenant for life (q). But this duty to convert does not arise where, *e.g.*, the leaseholds are bequeathed specifically and not by way of residue (r). X

When trustees or executors were directed by the will to convert the testator's property, and invest it in Government or real securities, and neglected to do either, it was for a long time a question whether they should be answerable for the principal money with interest, or the amount of stock which might have been purchased at the period when the conversion should have been made, with subsequent dividends, at the option of the *cestui que trust*; or whether they should be charged with the amount of principal and interest only, without an option to the *cestui que trust* of taking the stock and dividends. It has now been decided that the trustee is answerable only for the principal money and interest, and that the *cestui que trust* has no option of taking the stock and dividends. The principle upon which the court proceeds is, that the trustee is liable only for not having done what it was his duty to have done, and the measure of his responsibility is that which the *cestui que trust* must have been entitled to in whatever mode that duty was performed (s).

The limit or measure of trustees' liability for non-investment.

Executors have no authority in law to carry on the trade of their testator; but they may do so if the will contains a direction that they should do so (t); will,—their right of indemnity, and subrogated right of their creditors.

(q) 2 Sp. 42, 552, 557; *Bate v. Hooper*, 5 De G. M. & G. 338; *Howe v. Lord Dartmouth*, 7 Ves. 137; *Porter v. Baddeley*, L. R. 5 Ch. Div. 542; *Wright v. Lambert*, L. R. 6 Ch. Div. 649; and see *Macdonald v. Irvine*, 8 Ch. Div. 101; *Johnson v. Lawson*, W. N. 1879, 26; *Brown v. Gellatly*, L. R. 2 Ch. App. 751.

(r) *In re Beaumont's Estate*, 1 Sm. & G. 20; and see *Jeffreys v. Connor*, 28 Beav. 328.

(s) *Robinson v. Robinson*, 1 De G. M. & G. 247.

(t) *Williams on Executors*, p. 1798.

and when a testator gives such a direction, he may limit the direction to a specific part of the assets, which for this purpose he severs from his general assets. And where a trader has by his will directed his executor or trustee to carry on his trade, and to employ a specific portion of the trust estate for the purpose, the rule is, that though the executor or trustee is personally liable (*scil.* on contract) for debts incurred by him in carrying on the trade pursuant to the will, yet such executor or trustee has the right to resort for his indemnity to the specific assets so directed to be employed, but no further. And consequently the creditors of the trade are entitled to stand in the place of the executor or trustee, and to claim the benefit of that right, so as to obtain payment of their debts (*u*). But the rule does not apply when the executor or trustee is in default to the specific trust estate devoted to the trade; in such a case, the defaulting executor or trustee not being himself entitled to an indemnity, except upon the terms of making good his default, the creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless they first make good the default (*v*). Jessell, M.R., has stated this right of the creditors to be a mere corollary to the right of following trust funds, and to have been admitted by the courts of equity to prevent the injustice of the *cestuis que trustent* "walking off with the assets" which have been earned by the use of the creditors' property (*w*).

Remedies of  
*cestui que*  
trust in event  
of a breach of  
trust.

It remains to expound the remedies of a *cestui que trust*, and in the first place to inquire into whose hands the estate may be followed.

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(*u*) *Ex parte Garland*, 10 Ves. 120; *Ex parte Edwards*, 4 D. F. & J. 488.

(*v*) *In re Johnson*, *Shearman v. Robinson*, 15 Ch. Div. 548.

(*w*) *Ibid.*, pp. 552, 556.

If the alienee be a volunteer, then the estate may <sup>(x.) Right of following the trust estate.</sup> be followed into his hands whether he had notice of the trust or not (x), and if the alienee be a purchaser of the estate, even for valuable consideration, but with notice, the same rule applies (y). If, on the contrary, the alienee be a purchaser for valuable consideration, having the legal estate, and without notice, his title, even in equity, cannot be impeached, and he takes the land freed from the trust (z). Also, if a trustee who has been guilty of a breach of trust makes good the breach out of his own property, although it should be immediately prior to his own becoming a bankrupt, the trust estate is entitled to retain the benefit so acquired, and the general creditors cannot set aside the transaction as a fraudulent preference (a).

If the purchaser has no notice of the trust up to and at the time of completing his purchase, but *afterwards* discovers the trust, and *then* obtains a *voluntary conveyance* from the trustee, he could not, even prior to the Vendor and Purchaser's Act, 1874(b), protect himself by taking shelter under the legal estate so obtained by subsequent voluntary conveyance; for that is not like getting in a first mortgage, which the first mortgagee upon being paid off has a right to transfer to whomsoever he will (c), and here notice of the trust converts the purchaser into a trustee, and he becomes a party to a breach of the trust (d). In consequence of the Vendor and Purchaser's Act, 1874, sect. 7, all protection or priority derivable from getting in the legal estate was

(x) *Spurgeon v. Collier*, 1 Eden. 55.

(y) *Wigg v. Wigg*, 1 Atk. 382; *Kennedy v. Daly*, 1 Sch. & Lef. 345; *Daniels v. Davidson*, 16 Ves. 249.

(z) *Thorndike v. Hunt*, 3 De G. & Jo. 563; *Jones v. Powles*, 3 My. & K. 581; *Pilcher v. Rawlins*, L. R. 7 Ch. App. 259; *Fraser v. Murdoch*, 6 App. Ca. 855.

(a) *Ex parte Stubbins, in re Wilkinson*, 17 Ch. Div. 58.

(b) 37 & 38 Vict., c. 78.

(c) *Bates v. Johnson*, Johns, 304; *Carter v. Carter*, 3 K. & J. 617.

(d) *Sharpley v. Adams*, 32 Beav. 213; *Lewin*, 616.

abolished as from the 7th August 1874; that section was, however, repealed by the Land Transfer Act, 1875 (e), which came into operation on the 1st January 1876, and the repeal is expressed to be as from the date of the operation of the Act of 1874 (i.e., 7th August 1874), except as to anything duly done under the last-mentioned Act before 1st January 1876. Consequently the old rule, assigning a priority and protection to the legal estate, is again restored; but that priority or protection does not extend (as above mentioned) to the case of a subsequent *voluntary* conveyance of the legal estate by the trustee thereof, in breach of his trust to an equitable mortgagee, who at the date of obtaining the legal estate has notice of the breach of trust; and *semble*, even want of notice in such a case would make no difference (f).

Breach of trust creates a simple contract debt.

The debt created by a breach of trust is regarded only as a simple contract debt, both at law and in equity, even where the trust arises under a deed executed by the trustees, unless the trustee who committed such breach of trust has acknowledged the debt under seal (g). But the mere acceptance by deed of the trust will not create a specialty, unless there be a covenant, express or implied, for payment of the trust fund (h). But since the Act (i) abolishing the priority of specialty creditors in the administration of estates of persons dying after the 1st day of January 1870, the distinction is become of little importance—after the decease of the trustee; and since the Judicature Act, 1873 (j), enacting that no claim of

(e) 38 & 39 Vict., c. 87.

(f) *Mumford v. Stohwasser*, L. R. 18 Eq. 556. (g) 2 Sp. 936.

(h) *Isaacson v. Harwood*, L. R. 3 Ch. App. 225; *Holland v. Holland*, L. R. 4 Ch. 449; and see *Butler v. Butler*, L. R. 5 Ch. Div. 554; and, on appeal, 7 Ch. Div. 116.

(i) 32 & 33 Vict., c. 46.

(j) 36 & 37 Vict., c. 66, sect. 25, sub-sect. 2, not affected by the Real Property Limitations Act, 1874 (37 & 38 Vict., c. 57), s. 10, except as regards trust terms to secure legacy or charge payable out of land; and see *In re Baker*, *Collins v. Rhodes*, *In re Seaman*, *Rhodes v. Wish*, 20 Ch. D. 230.

a *cestui que trust* against his trustee held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitations, the distinction is deprived of all its importance,—during the life of the trustee and also after his death.

If the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust estate, so long as the substituted property can be traced (*k*). (a.) Right of following the property into which the trust fund has been converted.

Money, notes, and bills may be followed by the rightful owner, where they have not been circulated or negotiated, or the person to whom they have passed had express notice of the trust (*l*), and the only difference between money on the one hand and notes and bills on the other, is that money is not earmarked, and therefore cannot, except under particular circumstances, be traced; but notes and bills, from carrying a number or a date, can in general be identified by the owner without difficulty (*m*). The difficulty of identification does not arise where the trust property is still in the hands of the trustee; because in laying out trust moneys a trustee must be careful to keep his own property separate from the trust fund; and if he mix them, the *cestui que trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own (*n*). When money, notes, &c., may be followed.

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(*k*) *Lewin*, 645; *Frith v. Cartland*, 2 Hem. & M. 417; *Ernest v. Croysdill*, 2 De G. F. & J. 175; *Hopper v. Conyers*, L. R. 2 Eq. 549.

(*l*) *Verney v. Carding*, cited *Joy v. Campbell*, 1 Sch. & Lef. 345.

(*m*) *Lewin*, 647; *Ford v. Hopkins*, 1 Salk. 283; and see *Birt v. Burt*, 11 Ch. Div. 773 n.; *Harris v. Truman*, 7 Q. B. D. 340; and *disting. The New Zealand and Australian Land Co. v. Watson*, 7 Q. B. D. 374.

(*n*) *Lupton v. White*, 15 Ves. 432; *Mason v. Morley*, 34 Beav. 471, 475; see also *Hastie v. Hastie*, L. R. 2 Ch. Div. 304; *In re Hallet*, W.N., 1879, p. 146; and *disting. Fox v. Buckley*, L. R. 3 Ch. Div. 508.



Interest payable by trustees on a breach of trust.

It may be stated as a general rule, that if a trustee be guilty of any unreasonable delay in investing or transferring the fund, he will be answerable to the *cestui que trust* for interest during the period of his laches (o),—the rate being usually four per cent., but sometimes a higher rate.

When interest at more than four per cent. charged.

It is not easy to define the circumstances under which the court will charge executors and trustees with more than four per cent., or with compound interest; but in general the court will charge more than four per cent. upon balances in the hands of a trustee (p):—

(1.) Where he ought to have received more, as where he had improperly called in a mortgage carrying five per cent.

(2.) Where he had actually received more than four per cent. (q).

(3.) Where he must be presumed to have received more, as if he has traded with the money, in which case the *cestui que trust* has it at his option to take the profits actually obtained (r).

(4.) Where the trustee is guilty of direct breaches of trust or gross misconduct (s).

Acquiescence.

The remedy of a *cestui que trust* against his trustee for breach of trust of any sort may be barred by the concurrence of the *cestui que trust*, or by his acquiescence, or by his executing a release (t).

(o) *Stafford v. Fiddon*, 23 Beav. 386.

(p) *Att.-Gen. v. Alford*, 4 De G. M. & G. 851; *Penny v. Avison*, 3 Jur. N.S. 62.

(q) *In re Emmet's Estate, Emmet v. Emmet*, 17 Ch. D. 142.

(r) *Jones v. Fozall*, 15 Beav. 392; and see *Robinson v. Robinson*, 11 Beav. 371.

(s) *Mayor of Berwick v. Murray*, 7 De G. M. & G. 519; *Townend v. Townend*, 1 Giff. 212.

(t) *Brice v. Stokes*, 2 L. C. 877; *Harden v. Parsons*, Eden. 145; *Burrows v. Walls*, 5 De G. M. & G. 233; *Farrant v. Blanchford*, 1 De G. Jo. & Sm. 107, 119.

Persons under disability, as married women (*u*), or <sup>Persons under disability.</sup> infants (*v*), who have concurred in a breach of trust, may nevertheless proceed against the trustees, except where they have by their own fraud induced the trustees to deviate from the proper performance of their duties; and even in that excepted case, married women, at least, may occasionally proceed successfully against the trustee whom they have induced to deviate from his duties,—*e.g.*, where the trust is for the separate use of the married woman without power of anticipation (*w*).

A *cestui que trust* may, by a release or confirmation, prevent himself from taking proceedings against trustees for a breach of trust (*x*), but neither will be binding on him unless he had a full knowledge of the facts of the case (*y*); and the mere connivance of the *cestui que trust* at a breach of trust is not necessarily a confirmation of the breach (*z*). <sup>Release and confirmation.</sup>

A trustee is entitled to have his accounts examined and to have a settlement of them. If the *cestui que trust*, being *sui juris*, is satisfied that nothing more is due to him, he ought to close the account, and give an acknowledgment equivalent to a release. On the other hand, if the *cestui que trust* is dissatisfied with the accounts, he ought to have the accounts taken. He is bound to adopt one of these two courses; he is not at liberty to keep a Chancery suit hanging for an indefinite time over the head of the trustee (*a*). <sup>Settlement of accounts.</sup>

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(u) *Parkes v. White*, 11 Ves. 221.

(v) *Wilkinson v. Parry*, 4 Russ. 276.

(w) *Savage v. Foster*, 9 Mod. 35; *Wright v. Snowe*, 2 De G. & Sm. 321; *In re Lush's Trusts*, L. R. 4 Ch. App. 591; *Stanley v. Stanley*, 26 W. R. 310; 7 Ch. Div. 589.

(x) *French v. Hobson*, 9 Ves. 103.

(y) *Lloyd v. Attwood*, 3 De G. & Jo. 650; *Kay v. Smith*, 21 Beav. 522; *Burrows v. Walls*, 5 De G. M. & G. 254.

(z) *Walker v. Symonds*, 3 Swanst. 463.

(a) 2 Sp. 46, 47, 921.

Surcharging  
and falsifying.

Usually settled accounts are not opened (*i.e.*, taken over again throughout or *in toto*); but in an action for an account, when the plea of settled accounts is put forward in defence, the practice of the court is, upon proof of one clear omission or insertion that is erroneous, to give liberty to the plaintiff to *surcharge* the omission and to falsify the *insertion*, together with all other erroneous omissions and insertions; and this liberty is commonly called "liberty to surcharge and falsify" (*b*).

Trustee Act,  
1850,—Trustee's release  
under.

Under the Trustee Act, 1850 (*c*), and the Trustee Extension Act, 1852 (*d*), which apply to all trusts, whether express, implied, or constructive, the Court of Chancery may appoint a new trustee or new trustees, either in substitution for, or in addition to, any existing trustee or trustees whenever it is expedient to make such appointment, and it is inexpedient, difficult, or impracticable to do so without the aid of the court; but no such appointment by the court is to operate further or otherwise as a discharge to any former or continuing trustee than the like appointment under an express power in the instrument of trust would have done (*e*). But the occasions for having recourse to these Acts have been recently very much diminished by and in consequence of the Conveyancing and Law of Property Act, 1881 (*f*), which in its 31st, 32nd, 33rd, and 34th sections provides (in effect) for the appointment of new trustees, and for the vesting of the trust property in them jointly with any of the old who are continuing trustees, the appointor merely making a

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(*b*) *Heighington v. Grant*, 1 Phil. 601; *Pit v. Cholmondeley*, 2 Ves. Sr. 565; *Coleman v. Mellersh*, 2 M. & G. 309, 314; *Drew v. Power*, 1 Sch. & Lef. 182; and disting. *Blagrove v. Routh*, 2 K. & J. 509, 522; and *Watson v. Rodwell*, 7 Ch. Div. 625; 11 Ch. Div. 150.

(*c*) 13 & 14 Vict., c. 60.

(*d*) 15 & 16 Vict., c. 55.

(*e*) 13 & 14 Vict., c. 60, § 36.

(*f*) 44 & 45 Vict., c. 41.

declaration that the property shall so vest; and the new appointment in general operates to release the retiring trustee or trustees; and these provisions of the Act of 1881 are retrospective.

Also, under the Trustee Relief Act, 1847 (*g*), trustees and executors, or the major part of them, may, on affidavit, and without either action or other legal proceeding, pay trust moneys into the Bank of England to the account of the Paymaster-General, Chancery division, in the matter of the particular trust, and also transfer or deposit trust stocks and securities into or in the name of such Paymaster-General in such matter; but the relief afforded by this Act should not be resorted to unless there is a difficulty in administering or in further administering the trust fund. The court in the meantime takes charge of the trust fund and invests it; and upon petition by the person or persons claiming to be entitled thereto, the court will, upon notice to the trustees or executors, make an order for the payment out of the fund, and will also on such petition decide any questions of law or of fact incidental to such payment out, unless the court finds that the difficulties are such as to justify the institution of an action for the determination of the questions involved. The trustees and executors, after such payment into court, and to the extent thereof, are discharged of all control over the trust, and of all duties as trustees or executors (*h*); but they must give the *cestuis que trustent* notice of having paid the money in.

Trustee Relief Act, 1847,—  
Trustee's release under.

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(*g*) 10 & 11 Vict., c. 96, amended by 12 & 13 Vict., c. 74. And see 36 Geo. III., c. 52, § 32, as to payment into court of a legacy to which an *infant* is entitled.

(*h*) *Re Coe*, 4 K. & J. 199.

## CHAPTER VII.

## DONATIONES MORTIS CAUSA.

Essentials of  
(1.) Must be  
made in  
expectation of  
death.

It is essential to a valid *donatio mortis causa* that it should be made "in such a state of illness or expectation of death as would warrant a supposition that the gift was made in contemplation of that event" (a).

(2.) On condition to be  
made absolute  
on donor's  
death.  
Revoked by  
recovery or  
resumption.

A *donatio mortis causa* is always made on the condition, expressed or implied, that the gift shall be absolute only in case of the donor's death, and shall therefore be revocable during his life (b). Therefore, if the donor recover from his illness, or if he resume the possession of the gift, it will be defeated (c). Thus, in *Staniland v. Willot* (d), the plaintiff, being possessed of shares in a public company, and being in a state of extreme illness, transferred them into the name of the defendant; the plaintiff then recovered, but subsequently became a lunatic; and upon a bill filed in his name by his committee, the defendant was declared a trustee of the shares for the plaintiff.

(3.) Delivery  
essential.

And to the validity of a *donatio mortis causa* there is the further and all-essential requisite of delivery. For, if the intention be expressed in writing, but no delivery takes place, even though the document be signed by the donor, it will be ineffectual as a *donatio mortis*

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(a) *Edwards v. Jones*, 1 My. & Cr. 233; *Duffield v. Elwes*, 1 Bligh, N.S. 530.

(b) *Edwards v. Jones*, 1 My. & Cr. 233.

(c) *Ward v. Turner*, L. C. 983; *Bunn v. Markham*, 7 Taunt. 231.

(d) 3 Mac. & G. 664.

*causâ*, for in fact it is a legacy, and the writing will be held a testamentary document; and therefore, if not attested by two witnesses, as directed by the Wills Act (e), it will be void as a testamentary document (f). And although it might possibly be good as a declaration of trust (g), still that is not at all likely, at least in the general case; for what is clearly intended to operate in one way and fails to do so, is not, as a rule, construed by the court to operate in another way—in favour of a volunteer. And if the gift is made by parol, and there is no delivery of the article, it will be equally ineffectual as a *donatio mortis causâ*; nor can it possibly operate in such a case, either as a gift *inter vivos*, or as a testamentary disposition (h). But if there is an effectual delivery, with or without writing, the gift will be good, although the writing should not be attested at all (i).

On the other hand, if a donor intends to make a testamentary gift which turns out to be ineffectual, it will not be supported as a *donatio mortis causâ*. Thus, in *Mitchell v. Smith* (j), A. put into the hands of B. certain promissory notes, saying, "I give you these notes;" and on being reminded that they wanted indorsement, indorsed them in the presence of one witness as follows:—"I bequeath, pay the within contents to B. or his order at my death." Turner, L.J., thought that the language of the indorsement and the evidence showed that a testamentary disposition was intended, and that it was invalid as such for want of attestation as required by the Wills Act; also, that having been intended as a will, it could not be regarded, *in favour*

Imperfect  
testamentary  
gift,—not  
supported as a  
*donatio mortis  
causâ*.

(e) 1 Vict., c. 26.

(f) *Rigden v. Vallier*, 2 Ves. Sr. 258; *Tapley v. Kent*, 1 Rob. 400.

(g) *Morgan v. Malleon*, L. R. 10 Eq. 475.

(h) *Tate v. Gilbert*, 2 Ves. Jr. 120.

(i) 1 Vict., c. 26; *Moore v. Darton*, 4 De G. & Sm. 519.

(j) 12 W. R. 941.

of a volunteer, as a *donatio mortis causâ*, notwithstanding that there was a complete delivery.

Ineffectual  
gift *inter vivos*,  
not supported  
as a *donatio*  
*mortis causâ*.

So also if the donor intends to make a gift *inter vivos* which is ineffectual, it cannot be supported as a *donatio mortis causâ*. Thus, in *Edwards v. Jones* (k), the obligee of a bond, five days before her death, signed a memorandum, *not under seal*, which was indorsed upon the bond, and which purported to be an assignment of the bond without consideration to a person to whom the bond was at the same time delivered. The circumstances of the transaction did not constitute, in the opinion of the court, a *donatio mortis causâ*; and it was further held, that the gift, regarded as *inter vivos*, was incomplete, and being without consideration, the court could not give effect to it. "For the court will not aid a volunteer to carry into effect an imperfect gift."

What is a  
sufficient de-  
livery.  
(a.) To donee  
or donee's  
agent.

If a personal chattel be actually given by the donor himself to the donee, or by some other person at the donor's request into the hands of the donee, or to some other person as trustee or agent for the donee, a good delivery is constituted. In *Farquharson v. Cave* (l), it was held that a mere delivery to an agent, in the character of an agent, for the donor, would amount to nothing; it must be a delivery to the donee, or to the donee's agent (m). Where the chattel itself has not been delivered, the delivery of some effective means of obtaining it is sufficient, but not the delivery of a mere ineffective symbol (n). For example, if the thing given as a *donatio mortis causâ* be a chose in action, delivery of some document essential

(b.) Delivery  
of effective  
means of ob-  
taining the  
property.

(k) 1 My. & Cr. 226.

(l) 2 Coll. Ch. Ca. 367.

(m) *Moore v. Darton*, 4 De G. & Sm. 517.

(n) *Ward v. Turner*, 1 L. C. 983; *Snellgrove v. Bailey*, 3 Atk. 214.

to the recovery of the chose in action is sufficient. Thus, in *Moore v. Darton* (o), where, on a loan, the borrower had given the lender a receipt in the following terms:—"Received of Miss D. £500, to bear interest at five per cent. per annum,"—it was held that a delivery of the receipt to an agent of the borrower by the creditor on her deathbed, stating that she wished the debt to be cancelled, was a good *donatio mortis causa*. And so also, in *Jones v. Selby* (p), the delivery of the key of a box was held to be a sufficient *donatio mortis causa* of its contents.

In *Trimmer v. Danby* (q), upon the death of a testator, ten Austrian bonds were found, amongst other securities, in a box at his house, with the following indorsement:—"The first five numbers of these Austrian bonds belong to and are H. D.'s property," signed by the testator. H. D. was the testator's housekeeper, and the key of the box was given into her custody. It was held, that as there had been no actual transfer or delivery into the hands of H. D., the bonds still remained part of the testator's assets, the court being of opinion that the testator gave the key to H. D. *in her character of housekeeper, and for the purpose of taking care of it for his benefit*; the court at the same time assenting that the testator meant to give the bonds to H. D., and that the bonds were capable of being transferred by hand, but maintaining that in cases of this nature it must be proved that there has been an actual transfer of the property, and that everything has been done that is capable of being done to effect that transfer (r)—the mere intention to transfer not being sufficient in favour of a volunteer.

Examples  
of imperfect  
delivery.  
(a.) Delivery  
to donor's  
agent.

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(o) 4 De G. & Sm. 519.

(p) Prec. in Ch. 300.

(q) 25 L. J. Ch. 424.

(r) *Powell v. Hellicar*, 26 Beav. 261.



(b.) Delivery to donor's agent coupled with retention of ownership.

And so also in *Hawkins v. Blewitt* (s), A., being in his last illness, ordered a box containing wearing apparel to be carried to the defendant's house to be delivered to the defendant, giving no further directions respecting it. On the next day, the defendant brought the key of the box to A., who desired it to be taken back, saying he should want a pair of breeches out of it. *Held*, not to be a good *donatio mortis causâ*, and the learned judge said, "In the case of a *donatio mortis causâ*, possession must be immediately given; and also in parting with the possession, it is necessary that the donor should part with the dominion over it. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself."

What may be given as *donationis mortis causâ*.

There cannot, it seems, be a good *donatio mortis causâ* of railway stock (t); nor of the donor's own cheque upon a banker (u), unless cashed in his lifetime or otherwise negotiated (v). There may be a good *donatio mortis causâ* of a bond (w). The delivery of the mortgage deeds of a real estate will constitute a valid *donatio mortis causâ* (x). So also will the delivery of a promissory-note, payable to order though not indorsed (y). But the delivery of the title-deeds to an estate will not operate to convey the estate.

How it differs from a legacy, and agrees with a gift *inter vivos*.

A *donatio mortis causâ* differs from a legacy, and resembles a gift *inter vivos* in these respects:—1. It takes effect *sub modo* from the delivery in the lifetime of the donor, and therefore cannot and need not be

(s) 2 Esp. 663.

(t) *Moore v. Moore*, L. R. 18 Eq. 474.

(u) *Tate v. Hilbert*, 4 Bro. C. C. 286; *Boutts v. Ellis*, 4 De G. M. & G. 249; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *In re Mead, Austin v. Mead*, 15 Ch. Div. 651.

(v) *Rolls v. Pearce*, L. R. 5 Ch. Div. 730.

(w) *Snellgrove v. Baily*, 3 Atk. 214; *Gardner v. Parker*, 3 Mad. 184

(x) *Duffield v. Elwes*, 1 Bligh. N.S. 497.

(y) *Veal v. Veal*, 27 Beav. 303; *In re Mead, Austin v. Mead*, 15 Ch. Div. 651.

proved as a testamentary act. 2. It requires no assent or other act on the part of the executor or administrator to perfect the title of the donee. On the other hand, it differs from a gift *inter vivos* and resembles a legacy in these respects:—1. It is revocable during the donor's lifetime (z). 2. It may be made even at law to the donor's wife (a). 3. It is liable to the debts of the donor on a deficiency of assets (b). 4. It is subject to legacy duty (c). 5. It is subject to Probate duty (d).

How it resembles a legacy and differs from a gift *inter vivos*.

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(z) *Smith v. Casen*, cited 1 P. W. 406; *Jones v. Selby*, Prec. Ch. 300.

(a) *Tate v. Leithhead*, Kay, 658; and see new Conveyancing Act, 1881 (44 & 45 Vict., c. 41), § 50.

(b) *Smith v. Casen*, cited 1 P. W. 406.

(c) 8 & 9 Vict., c. 76; 1 Sp. 196.

(d) 44 & 45 Vict., c. 12, § 38.

## CHAPTER VIII.

## LEGACIES.

Suits for legacies only in equity unless executor assents.

No suit will lie at the common law to recover legacies, unless the executor has assented thereto (*a*), or unless the action should be by a legatee against the executors and a debtor as co-defendants, where the executors refuse to sue the debtor (*b*). But in cases of specific legacies of goods, after the executor has assented thereto, the property vests immediately in the legatee, who may maintain an action at law for the recovery thereof (*c*). The Court of Probate, established by the Court of Probate Act, 1857 (*d*), and which is the successor of the Ecclesiastical Court, is, moreover, by a proviso of section 23 of that Act (being the section which confers and defines the jurisdiction of the court), expressly excluded from entertaining suits for legacies or suits for the distribution of residues; and under the Judicature Act, 1875 (*e*), a plaintiff is not to assign his action to the Probate Division of the High Court of Justice unless he would have been entitled independently of—*i.e.*, previously to—the Judicature Acts to have commenced his action in the Court of Probate.

Equity jurisdiction,—  
When exclusive.

Where the bequest of a legacy involved the execution of a trust, express or implied, or the legacy was charged on land, or the other courts could not take due

(*a*) *Deeks v. Strutt*, 5 T. R. 690.

(*b*) *Yeatman v. Yeatman*, 7 Ch. Div. 210; *Travis v. Milne*, 9 Hare, 141.

(*c*) *Doe v. Gay*, 3 East. 120.

(*d*) 20 & 21 Vict., c. 77.

(*e*) 38 & 39 Vict., c. 77, sect. 11, sub-sect. 3.

care of the interests of all parties, courts of equity exerted an exclusive jurisdiction. And where the executor had assented to the legacy, courts of equity exercised a concurrent jurisdiction with the other courts <sup>When concur-</sup> over legacies; because the executor was treated as a trustee for the benefit of the legatees, a universal ground for the interposition of equity (*f*), and also because the aid of equity might be required to obtain discovery, account, or distribution of assets, or some other mode of relief which the other courts were incompetent to afford.

Bequests or legacies may be classed under three <sup>Division of</sup> heads,—general, specific, and demonstrative. A legacy <sup>legacies.</sup> is general where it does not amount to a bequest of <sup>1. General.</sup> any particular thing, as distinguished from all others of the same kind. Thus, if a testator gives A. a diamond ring, or £1000 stock, or a horse, not referring to any particular diamond ring, stock, or horse, these legacies will be general. The terms “pecuniary legacies” and “general legacies” are commonly used as synonymous, although “pecuniary legacy,” strictly speaking, means only “a legacy of money,” and may therefore be either “specific” or “general” (*g*).

A legacy is specific when it is a bequest of a parti- <sup>2. Specific.</sup> cular thing, or particular sum of money, or particular debt, as distinguished from all others of the same kind. Thus, if a testator gives B. “my diamond ring,” “my black horse,” “my £1000 stock,” or “£1000 contained in a particular bag,” or “owing to me by C.,” in these and the like instances the legacies are specific (*h*).

A legacy is *demonstrative* when “it is in its nature <sup>3. Demonstrative.</sup>

(*f*) *Hurst v. Beach*, 5 Madd. 360.

(*g*) 1 Rep. Leg., by White, 191 n.; *Hawthorn v. Shedden*, 3 Sm. & G. 293; *Fielding v. Preston*, 1 De G. & Jo. 438.

(*h*) *Stephenson v. Dowson*, 3 Beav. 342; *Manning v. Purcell*, 7 De G. M. & G. 55.

a general legacy, but there is a particular fund pointed out to satisfy it" (i). Thus, if a testator bequeaths £1000 out of his Reduced Bank Three per Cents the legacy will not be specific, but demonstrative (j).

#### Distinctions.

It is of great importance to distinguish these three different species of legacies one from the other. The chief points of difference are these:—1. If, after payment of debts, there is a deficiency of assets for payment of all the legacies, a general legacy will be liable to abate, but a specific legacy will not. 2. On the other hand, if a specific bequest is made of a chattel or a fund, which fails by alienation during the testator's lifetime, or otherwise, the legatee will not be entitled to any compensation out of the general personal estate of the testator; because nothing but the specific thing is given to the legatee (k). 3. But with regard to a demonstrative legacy, it is so far of the nature of a specific legacy, that it will not abate with the general legacies until the fund out of which it is payable is exhausted, and it is also so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the property pointed out as the means of paying it (l), that being only the primary fund for payment. And even with regard to general pecuniary legacies, the testator may have given some a priority over others, in which case (if the estate is insufficient) they will not abate *pari passu*, but those having priority will be paid first (m); and in general legacies given in lieu of dower or in satisfaction of debts have priority (n).

(i) *Ashburner v. Macguire*, 2 L. C. 236; *Robinson v. Geldard*, 3 Mac. & G. 735.

(j) *Sparrow v. Josselyn*, 16 Beav. 135.

(k) 1 Rep. Leg., by White, 191-2; Brown's Dict., title *Legacies*.

(l) Rep. Leg., by White, 237; see generally, *Mullins v. Smith*, 1 Drew & Sm. 210; *Vickers v. Pound*, 6 H. L. Cas. 885.

(m) *In re Hardy*, *Wells v. Borwick*, 17 Ch. Div. 798, distinguishing *Blower v. Morrett*, 2 Ves. Sr. 420.

(n) *Stahlschmidt v. Lett*, 1 Sm. & G. 421; and disting. *Roper v. Roper*, 24 W. R. 1013.

In deciding on the validity and interpretation of purely personal legacies, courts of equity in general follow the rules of the civil law, as recognised and acted on in the old ecclesiastical courts; but as to the validity and interpretation of legacies charged on land, they generally follow the rules of the common law, which endeavour in all cases to favour the heir (*o*). Accordingly, the courts favour the vesting of legacies if not charged on land, whereby they become transmissible to the personal representatives of the legatee should he die before the time of payment (*p*); but the courts have also persistently held that a legacy payable out of land, although it may be vested in one sense, yet sinks for the benefit of the inheritance in case the legatee dies before the period of payment (*q*), unless where that period is postponed, for adventitious reasons (*r*), and this is apart from all considerations of fraud, and is purely for the benefit of the heir. Again, legacies charged on land carry interest as from the date of the testator's death (*s*); on the other hand, general legacies, not so charged, carry interest as from one year after the testator's decease (*t*), but a general legacy given in satisfaction of a debt carries interest as from the death (*u*), as does also a general legacy to an infant child not otherwise provided for (*v*).

*Nota bene.*—Specific legacies carry interest from the death (*w*); and demonstrative legacies, so long as

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(*o*) See Hawkins on Construction of Wills; Brown's Law Dictionary, title *Legacies*.

(*p*) *Harrison v. Foreman*, 5 Ves. 207.

(*q*) *Pawlett v. Pawlett*, 1 Vern. 321; but see *Henty v. Wrey*, 19 Ch. Div. 492, reversed on appeal.

(*r*) *King v. Withers*, 3 P. Williams, 414.

(*s*) *Maxwell v. Wettenhall*, 2 P. Williams, 26.

(*t*) *Child v. Elsworth*, 2 De G. M. & G., 679.

(*u*) *Clark v. Sewell*, 3 Atk. 99.

(*v*) *Newman v. Bateson*, 3 Sw. 689.

(*w*) *Barrington v. Tristram*, 6 Ves. 345.

their proper fund remains, carry interest like specific, and afterwards like general legacies (x). The rate of interest is four per cent. (y).

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(x) *Mullins v. Smith*, 1 Dr. & Sm. 210.

(y) *Wood v. Bryant*, 2 Atk. 523.

## CHAPTER IX.

## CONVERSION.

"NOTHING is better established than this principle, General rule.  
 "that money directed to be employed in the purchase Money into  
 "of land, and land directed to be sold and turned into land.  
 "money, are to be considered as that species of property Land into  
 "into which they are directed to be converted, and this money.  
 "in whatever manner the direction is given, whether by  
 "will, or by contract, or in marriage articles or marriage  
 "settlement, or otherwise; and whether the money is  
 "actually paid or only covenanted to be paid; and  
 "whether the land is actually conveyed, or only agreed to  
 "be conveyed, the owner of the fund, or the contracting  
 "parties, may make land money, or money land" (a).

This notional conversion of land into money, or of Conversion.  
 money into land, may arise in two ways; *firstly*,  
 under wills; *secondly*, under deeds. It is proposed By will or  
 to treat the subject under the following heads,—dis- settlement.  
 tinguishing between deeds and wills:—

1. What words are sufficient to produce conversion;
2. From what time conversion takes place;
3. The general effects of conversion; and
4. The results of a total or partial failure of the objects and purposes for which conversion has been directed.

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(a) *Fletcher v. Ashburner*, 1 L. C. 898.



What words  
are sufficient.  
The direction  
to convert  
must be im-  
perative,  
whether  
(1.) Express ;

1. *What words are sufficient to produce conversion.*

The direction to convert either money into land or land into money must be imperative ; for if the direction to convert be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found. Thus, in *Curling v. May* (b), A. gave £500 to B., in trust that B. should lay out the same upon a purchase of lands, or put the same out on good securities, for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors, and administrators, and died in 1729. In 1731, H., the daughter, died without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H., and the money was decreed to the husband-administrator ; for Lord Talbot said, it was originally personal estate, and yet remained so, and nothing could be collected from the will as to what was the testator's principal intention (c). But where the conversion is apparently optional, as where trustees are directed to lay out personalty, "either in the purchase of lands of inheritance, *or* at interest," or "in land *or* some other securities," as they shall think most fit and proper, yet if the limitations and trusts of the money directed to be laid out are only adapted to real estates, so as to denote the testator's intention that land *shall* be purchased, this circumstance will outweigh the presumed option, and the money will be considered land (d). And, of course, the like rule will apply to the converse case, *i.e.*, when the limitations are (although they seldom are) exclusively applicable to personal estate, equity holding the doctrine that the intent rather than the form is to be considered (e).

Or (2.) Im-  
plied, *e.g.*,  
where limita-  
tions are  
adapted *only*  
to land, or  
*vice versa*.

(b) Cited 3 Atk. 255.

(c) *Bourne v. Bourne*, 2 Hare, 35.

(d) *Earlom v. Saunders*, Amb. 241.

(e) *Thornton v. Hawley*, 10 Ves. 129 ; *Grievson v. Kirsopp*, 2 Kee. 653 ; *Davies v. Goodhew*, 6 Sim. 585 ; *Burrell v. Baskersfield*, 11 Beav. 525.

2. *Time from which conversion takes place.*

Subject to the general principle that the terms of each particular instrument must guide in the construction and effect of that instrument (*f*), the rule is that in regard to wills, conversion takes place as from the death of the testator (*g*), and as to deeds or other instruments *inter vivos*, that it takes place as from the date of execution.

Time from which conversion takes place.

In wills from testator's death.

Deeds from execution and delivery.

As regards the time from which, in the absence of special circumstances, conversion takes place in the case of a deed, some observations of the court in *Griffith v. Ricketts* (*h*) are important. There a settlor conveyed the equity of redemption of real estate to trustees for sale for the benefit of his creditors, and on trust, if there should be any surplus, to pay the same to him, his executors, administrators, &c., to and for his and their own absolute use and benefit. *Held*, that this was a conversion of the real estate into personalty, as between the real and personal representatives of the settlor, on the following reasoning:—  
 “A deed differs from a will in this material respect;  
 “the will speaks from the death, the deed from delivery.  
 “If, then, the author of the deed impresses upon his  
 “real estate the character of personalty, that, as between his real and personal representatives, makes it  
 “personal and not real estate from the delivery of the  
 “deed, and consequently at the time of his death. The  
 “principle is the same in the case of a deed as in the  
 “case of a will; but the application is different, by  
 “reason that the deed converts the property in the  
 “lifetime of the author of the deed, whereas in the case  
 “of a will, the conversion does not take place until the  
 “death of the testator; and there is no principle on  
 “which the court, as between the real and personal  
 “representatives (between whom there is confessedly

(*f*) *Ward v. Arch*, 15 Sim. 389.

(*g*) *Beauclerk v. Mead*, 2 Atk. 167.

(*h*) 7 Hare, 311.

"no equity), should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs."

*Clarke v. Franklin*,—  
to same effect.

This rule was further illustrated in the case of *Clarke v. Franklin* (i). There a settlement was executed of real estate by deed (not enrolled), to the use of the settlor for life, with remainder (subject to a power of revocation never exercised) to the use of trustees and their heirs, upon trust to sell and pay certain sums of money to persons named, or to such of them as might be living at the settlor's death, and to apply the residue to charitable purposes. Some of the persons named survived the settlor, so that the purposes for which conversion was directed did not fail altogether, but the deed was void so far as it directed the proceeds of land to be applied to charitable purposes; and the question was, whether, under the circumstances, the surplus belonged to the heir or to the next of kin of the settlor. Vice-Chancellor Wood, following *Hewitt v. Wright* (j), held that *notwithstanding the trust for sale was not to arise until after the settlor's death*, the property was impressed with the character of personalty immediately upon the execution of the deed, and that the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personalty, and were, of course, upon his death distributable accordingly.

Rule as to deeds inapplicable when conversion is not the object.

As in mortgages.

But although it is true as a general rule that in a deed conversion takes place from the date of its execution, caution is required in applying that rule to instruments, such as mortgage deeds, where the general intention of the author of the trust is neither to convert nor to alter the devolution of the property, but merely to raise money. Thus in *Wright v. Rose* (k),

(i) 4 K. & J. 257.

(j) 1 Bro. C. C. 86.

(k) 2 Sim. & St. 323.

A., being seised in fee of a freehold estate, borrowed £300 from B., the defendant, and secured the repayment of it with interest by executing a mortgage deed of the estate, with power of sale, and by the terms of the deed it was provided that the surplus moneys to arise from the sale, in case the same should take place, should be paid to A., his *executors* or *administrators*. A. died intestate, and without ever having been married. All the interest due on the mortgage money had been duly paid by him up to the time of his death, but the principal remained unpaid. The interest that accrued due after his death having remained unpaid, B., the mortgagee, entered into possession, and afterwards sold the estate under the power of sale for a sum which greatly exceeded the mortgage money and interest. The question was whether the surplus of the purchase-moneys was real or personal estate. Sir J. Leach held that it was real estate on the following grounds:—  
 “If the estate had been sold by the mortgagee in the lifetime of the mortgagor, then the surplus moneys would have been personal estate of the mortgagor, and the plaintiffs (the next of kin of the mortgagor) would have been entitled. But the estate being unsold at the death of the mortgagor, the equity of redemption descended to his heir, and he is now entitled to the surplus produce (1).”

*a Sale under an execution would have a precisely similar effect—*

Closely connected in appearance with the class of cases just referred to, though differing from them in important essentials, are those cases where the conversion depends on an option to purchase to be exercised at a future time. Thus in *Lawes v. Bennett* (m), A. made a lease to B. for seven years, and on the lease was endorsed an agreement that if B. should within a limited time be minded to purchase the inheritance

Conversion depending on a future option to purchase.

(a.) Option created previously to will, —i. General devise, *Lawes v. Bennett*.

(1) See *Bourne v. Bourne*, 2 Hare, 35.

(m) 1 Cox. 167; see *Edwards v. West*, 7 Ch. Div. 858; *Reynard v. Arnolds*, L. R. 10 Ch. App. 386.

of the premises for £3000, A. would convey them to B. for that sum. B. assigned to C. the lease and the benefit of this agreement. A. died, and by his will gave all his *real* estate generally to D. and all his *personal* estate to D. and E. Within the limited time, but after the death of A., B. claimed the benefit of the agreement from D., who accordingly conveyed the premises to C. for £3000. *Held*, that the sum of £3000, when paid, was part of the *personal* estate, and that E. was entitled to one moiety of it as such. "It is very clear," observed the Master of the Rolls, X "that if a man seised of real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of B. whether it shall be real or personal. It seems to me to make no distinction at all. . . . When the party who has the power of electing has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period." Until, however, in such a case, the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate (n).

Rents until  
option is exer-  
cised go as  
realty.

2. Specific  
devise,—  
*Drant v.*  
*Vause.*

A similar question sometimes arises, where a testator devises lands over which a third party has a right at his option to purchase, whether, when such option is exercised, the purchase-money is to be bound by the same limitations as the real estate for which it has been substituted, or whether it is to follow the destination of the personal property of the testator. Thus in the case of *Drant v. Vause* (o), under a lease for years, the lessees had an option to purchase the fee-simple of the demised lands. After the date of the lease, the

(n) *Townley v. Bedwell*, 14 Ves. 591; *Ex parte Hardy*, 30 Beav. 206.  
(o) 1 Y. & C. C. C. 580.

lessor made his will, whereby he devised the lands, *specifically* describing them, to G. for life, with remainders over. After the testator's death, the lessees elected to purchase the fee-simple of the lands. *Held*, on the special terms of the will, that the purchase-money did not fall into the residue of the personal estate, but was subject to the same limitations as had been declared concerning the purchased lands, and therefore that G. took a life-interest in the purchase-money (*p*). It must be observed that in the above case, after the testator had made the agreement, he *specifically* and *in express terms* devised the lands, on certain limitations, from which it might be inferred that he intended that, at all events, the land or its value, in case the option should be exercised, should go to certain persons. It will be seen, therefore, on principle, that in a similar case of agreement first, and will afterwards, if the will do not *specifically* refer to the property so agreed to be sold, no such intention will be inferred, and when the option is exercised, the purchase-money will fall into the personalty. This point was decided in *Collingwood v. Row* (*q*), and also substantially in the before-stated case of *Lawes v. Bennett*. A

In the case of *Weeding v. Weeding* (*r*), the testator, after making a will devising a specific estate and bequeathing the residue of his personal estate to other persons, entered into a contract giving an option of purchase over part of the specific real estate, which option was exercised after his death. *Held*, that the property was converted from the date of the exercise of the option, and went to the residuary legatees. Wood, V.C., made the following observations:—"The testator must be presumed to know the law. With

(b.) Option created subsequently to will.

(1.) General devise.

(2.) Specific devise,—*Weeding v. Weeding*.

(*p*) *Emuss v. Smith*, 2 De G. & Sm. 722.  
 (*q*) 5 W. R. 484. (*r*) 1 J. & H. 424.

this knowledge he makes a will devising real estate in one way, and giving his personal estate upon different trusts. After this he makes a contract, the effect of which he knows will be to give a third person the power of saying, at a future time, whether a certain portion of what was then his real estate shall be realty or personalty. You cannot assume an intention that the property, in any event, is to be divided in the particular proportions as to value which existed at the date of the will. I understand the principle on which the cases of *Drant v. Vause* and *Emuss v. Smith* were decided to be this: when you find that in a will made *after* a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the *specific* property which is the subject of the contract, without referring in any way to the contract he has entered into, there it is considered that there is a sufficient indication of an intention to pass that property, to give to the devisee all the interest, whatever it may be, that the testator had in it.

*"But the case is very different when, after having given the property by will, the testator makes a sale of it. If it is a sale out and out, there is no question that the devisee's interest is taken away. Here the testator first gives the Kentish Town estate to certain devisees, and his personalty to other persons. After that, a part of the estate ceases to be Kentish Town estate, and becomes personalty. There is no republication of the will after the contract by which this change would, in a certain contingency, be brought about. The intention is, that all the Kentish Town property is to go one way, all the personalty another. The testator must be taken to have known when he had entered into the contract that what would ultimately be Kentish Town estate would depend on the option of the lessee; and the inference is, that he meant his*

property to go according to the state to which it would be reduced by the exercise of that option " (s).

Where the devise of real estate is general and not specific, the rule of *Weeding v. Weeding*, to the effect that there is a taking away or ademption of the property from the devisee, when the subsequently created option is subsequently exercised, would undoubtedly apply, and would *à fortiori* apply, a general devisee being always less favoured than a specific one. X

There is also another class of cases where conversion may have been directed or agreed upon, yet from the course of *subsequent events* it may be a question whether such constructive conversion has not ceased, so as that the heir and next of kin are restored to their original rights. The principles which govern these cases will be treated of hereafter in the chapter on reconversion.

Where purpose subsequently fails, property is reconverted.

### 3. *As to the effects of conversion.*

The effects of conversion.

These have been generally stated to be, to make personal estate real, and real estate personal.

(a.) Money directed to be turned into land descends to the heir (t), and land directed to be converted into money goes to the personal representatives (u).

(b.) Money belonging to a married woman directed to be converted into land is liable to the husband's curtesy, though under the same circumstances it was held, in deference rather to the custom of conveyancers than to principle, that the widow was not entitled to

(s) *Goold v. Teague*, 7 W. R. 84; *Woods v. Hyde*, 10 W. R. 339; and see *Frewen v. Frewen*, L. R. 10 Ch. App. 610.

(t) *Scudamore v. Scudamore*, Prec. in Ch. 543.

(u) *Ashby v. Palmer*, 1 Mer. 296; *Elliott v. Fisher*, 12 Sim. 505.



her dower out of the money of her husband directed to be laid out in land (*v*). This anomaly has been swept away by the Dower Act (*w*).

(*c*.) Again, before the Wills Act (*x*), an infant, under the age of twenty-one, might make a will of personal estate; but he could not, during minority, dispose of personalty to be laid out in land (*y*).

4. Results of total or partial failure.

(A.) Total failure—in deeds and in wills indifferently.

X  
The property results unconverted.

4. *The results of a total or partial failure of the purposes for which conversion is directed.*

*As to total failure.* The universal rule may be thus stated—that where a conversion is directed or agreed upon, whether by *will* or by *settlement*, or other *instrument* inter vivos, *whether of money into land or of land into money*, if the objects and purposes for which that conversion was intended have totally failed before the instrument directing the conversion comes into operation, no conversion will take place, but the property so directed or agreed to be converted will remain in its original state, or rather, will result to the testator or settlor with its original form unchanged. In the words of Wood, V.C., in the case of *Clarke v. Franklin* (*z*), “So here, if at the moment when the grantor put his hand to this deed, the purpose for which conversion was directed had failed, for instance, if he had given all the proceeds instead of a part to charitable purposes, so that the property would have been *at home* in his lifetime, the court would have regarded it as if no conversion had been directed, and the property would have resulted to the grantor as real estate” (*a*).

Where the purposes for which conversion is directed

(*v*) *Sweetapple v. Bindon*, 2 Vern. 536.

(*w*) 3 & 4 Will. IV., c. 105, s. 2.

(*y*) *Earlom v. Saunders*, Amb. 241.

(*a*) *Ripley v. Waterwork*, 7 Ves. 435; *Smith v. Claxton*, 4 Mad. 492.

(*x*) 1 Viet., c. 26.

(*z*) 4 K. & J. 257.

have *partially failed* before the instrument directing (B.) Partial the conversion has come into operation, the rules are <sup>failure.</sup> somewhat complex, and it will be necessary to deal *seriatim* with the cases, regard being had to the nature of the instrument by which such conversion is directed.

I. Cases under wills:—

I. Under wills.

(a.) Of land into money.

(b.) Of money into land.

II. Cases under settlements or other instruments *inter vivos*:—

II. Under instruments *inter vivos*.

(a.) Of land into money.

(b.) Of money into land.

With reference to each of these four cases three <sup>Three ques-</sup> questions will arise:—

1stly. To what extent is the trust for conversion still in force?

2dly. Who is to benefit by the lapse or failure,—the heir or the personal representative of the testator or settlor?

3dly. In what character will the benefit accruing to the testator's or settlor's real or personal representative to be taken by such real or personal representative?

I. Cases under wills.

I. Under wills.  
Land into money.

(a.) Of land into money.

In *Ackroyd v. Smithson* (b), a testator gave several <sup>*Ackroyd v. Smithson*,—</sup> legacies, and ordered his real and personal estate to be the heir takes sold, his debts and legacies to be paid out of the proceeds arising out of the sale, and the residue thereof the undis- posed-of sur- plus, or sur- plus lands. he gave to certain legatees of a previous part of his

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(b) 1 Bro. C. C. 503, 1 L. C. 949.



its nature as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or the other must take some part of it; but to say he has made it all personal property, and that, therefore, the law must give it to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which have not occurred, for the sake of proving a similar intention, where the circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, in order to prove that he intended the same in favour of his next of kin, is to reason from a case in which intention is expressed to prove a like intention in a case which supposes the absence of intention."

Undisposed-of proceeds result to the heir.

It has recently been decided in *Steed v. Preece* (d), that the doctrine of *Ackroyd v. Smithson* does not extend to the case of a sale under an order of the court in favour of an heir-at-law who had consented to such sale. Lands had been sold to raise an infant's costs in a suit for partition, and it was held that the personal representative was entitled to the surplus as against the remainder-man. Jessel, M.R., there said, that "in *Ackroyd v. Smithson* no such general principle as the following was decided—namely, that if a trustee or the court sell so much land as it is judged will be required to raise a charge, and there is a surplus, there is an equity to reconvert that surplus in favour of the real representative. The true principle is this, that the

Doctrine does not apply to a sale by the court.

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(d) 22 W. R. 432; *Foster v. Foster*, 1 Ch. Div. 588; *Mildmay v. Quicke*, 6 Ch. Div. 553; but see *Cooke v. Dealey*, 22 Beav. 196.

moment a sale is *properly* made, conversion follows, and there is no equity to reconvert the surplus."

*Smith v.*

*Claxton*: The land to be sold results to the heir,—as personal estate, if that is its actual condition.

From the case of *Ackroyd v. Smithson* the questions as to what extent the conversion is still in force, and who benefits by the lapse, will find a complete answer; but the further question still remains, whether the land directed to be sold results to the heir as real or as personal property,—a question that sometimes arises between the real and personal representatives of such heir. The doctrine on this subject is clearly laid down in the case of *Smith v. Claxton* (e), a case illustrative of the principles governing equity with reference to cases both of total and of partial failure. "A devisor may give to his devisee either land or the price of land at his pleasure, and the devisee must receive it in the quality in which it is given, and cannot intercept the purpose of the devisor. If it be the purpose of the devisor to give lands to the devisee, the land will descend to his heir; if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of the devisee's personal estate. Under every will, when the question is whether the devisee, or the heir, failing the devisee, takes an interest in the land, as land or as money, the true inquiry is, whether the devisor has expressed a purpose that in the events which have happened the land shall be converted into money. Where a devisor directs his land to be sold, and the produce to be divided between A. and B., the obvious purpose of the testator is that there shall be a sale for the convenience of division, and A. and B. take their several interests as money and not as land. So if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor that there shall be a sale for the convenience of division still applies; and the heir will take the share of A., as

✓ (a.) Where sale is necessary,—it results as money to the heir.

(e) 4 Mad. 492; and see *Mordaunt v. Benwell*, 19 Ch. Div. 302.

A. would have taken it, as money and not as land. But suppose A. and B. both to die in the lifetime of the devisor, and the whole interest in the land descends to the heir, the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the quality of money to the interest of the heir. The obvious purpose of the devisor being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would therefore take the whole interest as land." From the course of this argument, and from the current of authorities, the rule would seem to be briefly this, that where it is *necessary* to sell the land for the purposes of the trust, and there is only a *partial* disposition of the produce of the sale, here the surplus belongs to the heir as money, and not as land, and will therefore go to his personal representative, even though the land may not have been sold during his lifetime, provided that it be afterwards actually sold, and the surplus ascertained (*f*).

(b.) Where sale is unnecessary, and is not made, or so far as not made,—it results as land to the heir.

(b.) Money directed to be laid out in land.

Money into land.

The principle on which *Ackroyd v. Smithson* was decided applies also to the converse case of money directed to be laid out in the purchase of real estate, devised to uses which partially fail; for the undisposed-of interest in the money will result for the benefit of the next of kin of the testator as personalty, and will not go to the heir-at-law (*g*). Lord Cottenham, while Master of the Rolls, in the case of *Cogan v. Stephens* (*h*), after examining all the authorities upon this subject, put an end to the anomaly which would otherwise have existed

*Cogan v. Stephens*: Undisposed-of money results to personal representatives.

(*f*) *Wright v. Wright*, 16 Ves. 188; *Jessopp v. Watson*, 1 My. & K. 665; *Wall v. Colshhead*, 2 De G. & Jn. 683.

(*g*) *Reynolds v. Godlee*, Johnson, 536, 582.

(*h*) 1 Beav. 482, n.

in the law of conversion, by deciding in favour of the claims of the next of kin. In *Cogan v. Stephens*, the testator ordered that £30,000 should be laid out immediately by his executors in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which should belong to his widow during her life, and after her decease to certain persons (all of whom died during the life of his widow without issue) in tail, with remainder to a charity. The money was not laid out, and the gift to the charity being void under the statute of mortmain, it was held that the next of kin, and not the heir-at-law of the testator, was entitled to the fund. "If a testator," said his Lordship, "devises land for purposes altogether illegal or which altogether fail, the heir-at-law takes it as undisposed of. If a testator gives personal property for purposes altogether illegal or which altogether fail, the next of kin takes it as in the case of an intestacy, as undisposed of. If a testator devises land for purposes which are in part illegal, or which partially fail, or which require part only of the lands devised, the heir takes so much of the land as is undisposed of, and which was destined for the purpose, which by law cannot, or in fact does not, take effect, and so much as is not required for the purposes of the will, and this is whether the land be actually sold or not. But here, it is said, the analogy between the cases of land and money ceases, and that if a testator directs money to be laid out in the purchase of land for purposes which are partly illegal or which partially fail, the next of kin has no such interest in the money as cannot be applied to the purposes of the will; but if there are purposes legal and feasible which require the investment, the next of kin are excluded. And why are they to be so excluded? . . . In deciding in favour of the next of kin, I am following the principle of *Ackroyd v. Smithson*, and maintaining that uniformity of decision as to the conversion of land into money,

and of money into land, which was supposed to exist before that time."

So far the analogy between cases of conversion of land into money and of money into land is complete. Here, however, the analogy ceases, or rather apparently ceases, but in reality continues. As to the question—in what character the undisposed-of personalty to be converted into land comes into the hands of the personal representative of the testator, whether, in apparent analogy to the decision in *Smith v. Claxton*, he will take it as realty, or whether he will take it in its original character of personalty, the case of *Reynolds v. Godlee* (i) has decided that the latter is the true view—that personalty directed by will to be laid out in land to be held in trusts which do not exhaust the absolute interest, devolves, after the expiration of the specified trusts, upon the executors of the testator, as personalty for the next of kin, *that being of course its actual condition at the time of its devolution* (j). And this is in fact what the converse case of *Smith v. Claxton* decided, although it is commonly misunderstood on this precise point. "It is urged," said Wood, V.C., "that the analogy of *Smith v. Claxton* must be applied completely, as to make this real estate in the hands of the next of kin. But there is a great difference between realty and personalty in this respect. It is not the next of kin at all, but the executors on whom personal property devolves, until the purposes of the will are satisfied. . . . The executor is in general the only person who can stand here to claim the personal estate, and whatever he gets in *quid* executor, he must hold as personalty."

It was decided in *Jessopp v. Watson* (k), that the

(i) 1 Johnson, 536, 583.

(j) *Curteis v. Wormald*, 10 Ch. Div. 172.

(k) 1 My. & K. 667.



Blending of real and personal estate,—the principle of *Ackroyd v. Smithson* is not thereby excluded.

blending of the proceeds of the real with the personal estate, for an express purpose which fails, will not operate to convert the real into personal estate for a purpose not expressed; viz., to give it to the next of kin. This rule received a strong application in *Fitch v. Weber* (1). There the testatrix devised and bequeathed her real and personal estate in trust, as to the real estate for sale, as soon after her decease as could be, and declared that the trustees should stand possessed of the proceeds of the sale, as a fund of personal and not of real estate, *for which purpose such proceeds, or any part thereof, should not in any case lapse or result for the benefit of the heir-at-law*; and after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should by any codicil to her will direct or appoint. The testatrix made no codicil. It was held that the heir-at-law was entitled to the proceeds of the real estate undisposed of—that the mere intention to exclude the heir was of no avail, *unless there was a gift over on failure of the purposes, to some one else*—that the purpose for which the testatrix said she excluded the heir was simply that the realty might be made a fund of personalty, which purpose would not *per se* be sufficient to disinherit the heir *except for the purposes of the will*.

Conversion for purposes of will, or out and out.

The several cases on the subject seem to depend on this question,—“Whether the testator meant to give the produce of the real estate the quality of personalty to *all intents*, or only so far as respected the particular purposes of the will; for unless the testator has sufficiently declared his intention that the realty shall be converted into personalty not only for the *purposes of the will*, but further, that the produce of the real estate shall be taken as personalty, *whether such purposes*

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(1) 6 Hare, 146.

take effect or not, so much of the real estate or produce thereof as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or inefficiency of the will itself, or from subsequent lapse or other cause of failure) will result to the heir. But every conversion, however absolute in its terms, will be deemed a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons respectively on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin" (m).

II. Cases under settlements or other instruments *inter vivos*. II. Cases under settlements.

- (a.) Of land into money.
- (b.) Of money into land.

In both these cases one general rule is applicable. When by an instrument *inter vivos* realty is directed to be converted into personalty (n), or personalty into realty (o), for certain specified purposes or objects, and a part of those purposes or objects fail, the property to that extent results to the settlor, and through him, if it is land directed to be converted into money, it goes to his personal representatives (p), and if it is money directed to be converted into land, it goes to his heir (q); and its subsequent further devolution (if any) will, *semble*, depend upon its actual character at the time that further devolution arises. X

(m) Mr. Cox's note to *Cruse v. Barley*, 3 P. Wms. 22; 1 Jarman on Wills, 530, 2d ed.; *Amphlett v. Parke*, 2 Russ. & My. 221; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Robinson v. Governors of London Hospital*, 10 Hare, 19; *Barra v. Fowkes*, 13 W. R. 987.

(n) *Clarke v. Franklin*, 4 K. & J. 263.

(o) See *Pulteney v. Dartington*, 1 Bro. Ch. Ca. 223; *Lechmere v. Lechmere*, Ca. temp. Talb. 80.

(p) *Griffith v. Rickells*, 7 Hare, 299.

(q) *Wheldale v. Partridge*, 8 Ves. 236.

Distinction  
between par-  
tial failure  
under a will  
and under a  
settlement.

It will be seen, therefore, that there is a material distinction as to the application of the doctrine of resulting trusts between those cases where conversion partially fails, when it is directed by will, and when it is directed by deed. In the case of conversion directed by will, if there has been any partial failure of the purposes for which the conversion has been directed, to that extent it will result to the testator's representatives, real or personal, who would have been entitled to take it had no conversion been directed, whereas in the case of conversion directed by deed or other instrument *inter vivos*, the rule is just the reverse (r).

The reason of this distinction, as has already been pointed out, is, that whereas a will comes into operation from the death of the testator, a deed takes effect in the settlor's lifetime, from the moment of its delivery. A simple illustration will suffice to set the rules on this subject in the clearest light. Suppose a conveyance of real estate by deed upon trust to pay the rents and profits to the settlor during his life, and after his death to sell the same and divide the proceeds between A. and B. equally, if then living. Afterwards A. dies before the time when his share becomes due, *i.e.*, before the settlor's death as to his moiety there is a failure. Who takes it? Clearly the settlor, who is still alive, and to whom it must therefore result; but in what form? Here steps in the principle, that a deed, for the purpose of conversion, operates from the moment of its delivery, even though the settlor has directed the sale to take place after his death. The deed, therefore, has converted the realty in the lifetime of the author of the deed. "Whatever be the time at which that conversion is directed to take place, whether in the grantor's lifetime or after his death, the grantor by executing a deed of this

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(r) Brown's Dictionary, title *Conversion*.

description says, in effect, '*From the time I put my hand to this deed, I limit so much of this property to myself as personal property*'" (s). The property results into the hands of the settlor, not as realty, but in that form into which he has directed it to be converted, i.e., as personalty (t).

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(s) *Clarke v. Franklin*, 4 K. & J. 263.

(t) *Ibid.*

## CHAPTER X.

### RECONVERSION.

**Reconversion.** RECONVERSION may be defined as that notional or imaginary process by which a prior notional conversion is annulled and taken away, and the notionally converted property is restored in contemplation of a court of equity to its original actual unconverted quality.

**Two varieties of reconversion.**

The cases on this subject range themselves under two heads. Reconversion may take place in either of two ways—viz., either:

- I. By the act of the parties; or,
- II. By operation of law.

**I. By the act of the parties.**

I. Reconversion by the act of the parties.

(A.) Who may and who may not elect, so as to reconvert,—and to what extent?

**1. By absolute owner.**

1. It is clear that an absolute owner in fee-simple in possession of property directed to be converted may elect to take that property in whatever form he chooses,—there being, in fact, no other person who has any voice in the matter. "And the reason is this, that since "equity, like nature, will do nothing in vain," if the person in whose favour the conversion is directed elects to have the property in its unconverted state, it will be vain for equity to compel the doing of that which may be undone the next moment. But

as the presumption is, that what ought to be done will be done—that conversion will take place—the onus of proof will be on those who allege that the owner has reconverted the property (a).

2. So far the law is clear when the person entitled either to the money to be laid out in land, or to the land to be sold for money, is the absolute and only fee-simple owner in possession. But what is the principle when the person entitled is entitled not to the whole subject-matter, but to an undivided share?

(a.) Of money into land. In *Seeley v. Jago* (b), A. devised £1000 to be laid out in the purchase of lands in fee for the benefit of A., B., and C., *equally to be divided*. A. dies leaving an infant heir, and B. and C., together with the infant heir, bring a bill for the £1000. The Lord Chancellor said, "The money being directed to be laid out in land for A., B., and C. *equally*, which makes them tenants in common, and B. and C. electing to have their two-thirds in money, let it be paid to them, for it is vain to lay out this money in land for B. and C., when the next moment they may turn it into money, and equity, like nature, will do nothing in vain."

2. By owner of an undivided share.

(a.) Of money to be turned into land,—the undivided owner may reconvert.

(b.) Land to be turned into money. In *Holloway v. Radcliffe* (c), A. B. was entitled to two-thirds of an estate directed to be converted into personalty. *Held*, that it had not been reconverted into realty by acts of A. B., done independently of the person entitled to the remaining one-third. Here the principle is clear. The sale of an undivided share would presumably be less marketable, and produce a far less sum than would be receivable in respect of that share of the proceeds

(b.) Of land to be converted into money,—the undivided owner may not reconvert.

(a) *Siason v. Giles*, 11 W. R. 971; *Benson v. Benson*, 1 P. Wms. 130.

(b) 1 P. Wms. 389.

(c) 23 Beav. 163.

of sale of the entirety; and therefore neither of the two undivided owners has a right to compel the other to forego a sale of the whole property.

3. By remainder-man,—to extent of his own interest only.

3. A remainder-man cannot elect so as to affect the interests of the owners of prior estates. Take, for instance, the simple case of a settlement of money to be laid out in land upon trust for a tenant for life, with remainder in fee to some third person. The tenant for life can insist on his rights under the settlement, and can compel the trustees of the settlement to lay out the money as directed by the settlement. There is no principle either at law or in equity by which the remainder-man in fee can, as against the tenant for life, elect to take the property as money. But, of course, there is nothing to prevent the remainder-man declaring *as between his real and personal representatives*, who claim as volunteers under him, that a particular reversionary interest to which he is entitled shall be money or shall be land (*d*).

By infants.

4. An infant cannot ordinarily reconvert (*e*); because, usually, the matter can wait till he comes of age. And if the matter won't wait, then the court may direct an inquiry whether it is for the benefit of the infant to reconvert or not, and will order and decree according to the result of the inquiry,—but apparently without prejudice to the diverse rights of the real and personal representatives of the infant dying under age (*f*).

5. By lunatics.

5. A lunatic cannot reconvert (*g*), but his committee, with the sanction of the court, may do so for

(*d*) 2 Sp. 271; *Triquet v. Thornton*, 13 Ves. 345; *Gillies v. Longlands*, 4 De G. & Sm. 372, 379; *Cookson v. Cookson*, 12 Cl. & F. 121.

(*e*) *Seeley v. Jago*, 1 P. W. 389; *Curr v. Ellison*, 2 Bro. C. C. 56; *Dyer v. Dyer*, 13 W. R. 732; *Robinson v. Robinson*, 19 Beav. 494.

(*f*) See the chapter on *Infants*, *infra*; also *Foster v. Foster*, L. R. 1 Ch. Div. 588.

(*g*) *Ashby v. Palmer*, 1 Mer. 296.

him, in which case the like inquiry will be directed as in the case of infants; only the court, *semble*, will not in the case of lunatics have any regard to, or make any saving of, the diverse rights of the real and personal representatives of the lunatic (*h*).

6. The rules as to the capability of married women to reconvert demand a more particular consideration. 6. By married women.

(a.) As to money to be converted into land. (a.) Money into land.

A *feme covert* cannot elect by a contract or ordinary deed (*i*). But although, as observed by Lord Hardwicke in *Oldham v. Hughes* (*j*), "a *feme covert* cannot alter the nature of money to be laid out in land, *barely* by a contract or deed, for to alter the property of it, or course of descent, yet the money may be invested in land (and sometimes sham purchases have been made for that purpose), and she may then levy a fine of the land and give it to her husband, or anybody else. There is a way, also, of doing this without laying the money out in land, and that is by coming into this court, whereby the wife may consent to take this money as personal estate; and upon her being present in court, and being examined (as a *feme covert* on a fine is) as to such consent, it binds this money articulated to be laid out in land as much as a fine at law would the land, and she may then dispose of it to her husband, or anybody else; and the reason of it is, that at law money so articulated to be laid out in land is considered *barely* as money till an actual investiture and the equity of this court alone views it in the light of a real estate; and, therefore, this court can act upon its own creature, and do what a fine at common law can upon land, and if the wife has craved aid of this court in the manner I have mentioned, she might have changed

(h) See the chapter on *Lunatics*, *infra*.

(i) *Frank v. Frank*, 3 My. & Cr. 171.

(j) 2 Atk. 453.



the nature of this money which is realised; but she cannot do it by deed."

(bb.) At present, the married woman executes a deed acknowledged, and so reconverts.  
3 & 4 Will. IV., c. 74, s. 77.

The necessity of making these sham purchases caused much inconvenience, which was attempted to be remedied by several statutes. Finally, by 3 & 4 Will. IV., c. 74, s. 77, a married woman was permitted by deed executed in compliance with its provisions to make her election to take or dispose of money to be laid out in land (*k*).

(b.) Land into money.

(b.) Land to be converted into money.

(aa.) Anciently, the married woman reconverted by levying a fine.

Here the husband and wife might, before the stat. 3 & 4 Will. IV., c. 74, so long as the land remained unsold, by levying a fine, bar all the wife's estates and interest in the money to arise from the sale of the land (*l*). Such was the state of the old law; and under the Act for the abolition of fines and recoveries the result is the same. That Act in substance says (*m*), that a married woman may, with her husband's concurrence, by deed acknowledged under the Act, dispose of lands, or of money subject to be invested in lands, and also of "any interest in land, either at law or equity, or any charge, lien, or encumbrance in, or upon, or affecting land, either at law or in equity." In *Briggs v. Chamberlain* (*n*), it was decided that where the personal estate consists of moneys to arise from the sale of lands, she might bind her interest by a deed acknowledged, the subject-matter of disposition being then an interest in land, and falling, therefore, within the words of the statute; and in *Tuer v. Turner* (*o*), it was similarly decided regarding a married

(bb.) At present, the married woman reconverts by executing a deed acknowledged.

(*k*) *Forbes v. Adams*, 9 Sim. 462.

(*l*) Co. Litt. 121 a. n.; *May v. Roper*, 4 Sim. 360.

(*m*) Sec. 77.

(*n*) 11 Hare, 69.

(*o*) *Tuer v. Turner*, 20 Beav. 560.

woman's reversionary interest, or remainder, in like moneys.

(B.) Mode in which election to take the property in its actual state may be made. How election is shown.

Of course it is clear that an express declaration of intention on the part of the absolute owner of property, not being under any disability, that it shall be deemed real or personal estate, is *per se* sufficient to bind those claiming under him, without any reference to the actual state or condition of the property at the time, though it has been doubted whether a declaration by parol would be sufficient (*p*). (a.) By express direction.

But much greater difficulty arises where the owner does not express his intention so to reconvert; the question will then occur, what acts of the owner are sufficient to lead to an inference that he desired and intended to possess the property according to its actual state and condition? (b.) By implied direction, from conduct.

(a.) As to real estate directed to be converted into money, slight circumstances are sufficient to raise a presumption that the owner has elected to retain it as realty. Thus if a person keeps land unsold for a long time, a presumption will arise that he has elected to take it as land (*q*). So the circumstances of granting a lease, reserving rent to the party entitled, her heirs and assigns, was strong evidence of an intention in the lessor to elect that it should continue as land (*r*). In *Davies v. Ashford* (*s*), by marriage settlement real estates were conveyed to trustees, on trust to sell, and hold (aa.) As to land into money,—slight circumstances suffice to reconvert.

(*p*) *Bradish v. Gee*, Amb. 229; but see *Chaloner v. Butcher*, cited 3 Atk. 685; *Pulleney v. Darlington*, 1 Bro. C. C. 237; *Wheldale v. Partridge*, 8 Ves. 236; 1 L. C. 93a.

(*q*) *Dixon v. Gayfere*, 17 Beav. 433; *Griesbach v. Fremantle*, 17 Beav. 314; *Kirkman v. Miles*, 13 Ves. 338; *Mutlow v. Bigg*, L. R. 1 Ch. Div. 385; *In re Gordon, Roberts v. Gordon*, L. R. 6 Ch. Div. 531.

(*r*) *Crabtree v. Bramble*, 3 Atk. 680.

(*s*) 15 Sim. 42

the proceeds on trust for the husband and wife, for their lives successively, remainder on trust for their children, remainder on trust for the survivor of husband and wife absolutely. There was no issue. The husband survived his wife, and after her death consulted his solicitor as to his rights under the settlement, and then got possession of the settlement and title-deeds, &c., and remained in possession of them until his death, and also of the estates. *Held*, that he had elected to take the estates as land. The V.-C. of England said, "It does not distinctly appear in whose custody the title-deeds originally were, but it is clear that there was a change in the possession of them, and that Mr. Davies got them into his custody. Now, was not that of necessity a destruction of the trust? For the trustees could not have compelled Mr. Davies to deliver up the deeds; and without doing so they could not have made an effectual sale of the estate."

(bb.) As to money into land,—slight circumstances not sufficient to reconvert.

(b.) As regards personal estate to be laid out in land, of course, if the person absolutely entitled receives the money from the trustees, he is held to have elected to take it as money, and the trust is at an end (t). But it will not be so deemed where he has received merely the *income*, though for a long time (u).

## II. By operation of law.

## II. Reconversion by operation of law.

Concurrence of two requisites to reconversion necessary,—  
1st, property in person en-

If an instrument is to be taken to impress a fund with real qualities, the money being once clearly impressed with real uses, as land, in a contest between the heir and executor, the impression will remain for

(t) *Trafford v. Boehm*, 3 Atk. 440; *Rook v. Worth*, 1 Ves. Sr. 461; *Cookson v. Cookson*, 12 Cl. & F. 147; *In re Davidson*, *Martin v. Trimmer*, 11 Ch. Div. 341.

(u) *Gillies v. Longlands*, 4 De G. & Sm. 372; *Re Pedder's Settlement*, 5 De G. M. & G. 890.

the benefit of the heir; and to put an end to that impression two things are necessary, neither of which standing alone will suffice to reconvert the property: that is to say, firstly, it must be shown that the money was in the hands, i.e., in the actual possession, of a person who had in himself both the executors and the heirs (v); and, secondly, that person must have died without making any declaration of his intention regarding it. If both these two things combine, then the property shall go according to the quality in which it was left by him at his death. And these two things being proved, the onus of proof to the contrary lies, of course, on those who deny reconversion, whereas in the case of reconversion by the act of the parties, it was pointed out that the onus lies on those who allege reconversion.

In *Chichester v. Bickerstaff* (w), on the marriage of Sir John Chichester with the daughter of Sir Charles Bickerstaff, Sir Charles by articles covenanted to pay £1500 in part of the portion, which, together with £1500 to be advanced by Sir John within three years after the marriage, was to be invested in land and settled on Sir John for life, remainder to his intended wife for life, remainder to their issue, remainder to Sir John's right heirs. Within a year of the marriage the wife died childless, and Sir John *three days after his wife*. Sir John by his will made Sir Charles his *executor*, and devised the residue of his personalty, after debts, &c., paid, to Frances Chichester, his sister. The heir-at-law of Sir John filed a bill against Sir Charles to compel him to pay the £1500 which Sir John had covenanted to pay, insisting that by virtue of the marriage articles the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir. But Lord Somers

titled, whether it be real or personal, and, 2d, no declaration by him concerning it.

the money was "at home" for three days only, and Sir John "died and made no sign" about it.

(v) *Wheldale v. Partridge*, 8 Ves. 235.

(w) 2 Vern. 295.

said, "This money, though once bound by the articles, yet, when the wife died without issue, became free again, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and the case is much stronger where there is a residuary legatee," and therefore dismissed the bill.

*Pulteney v. Darlington*,—the money was doubly reconverted, having been twice over "at home."

In the case of *Pulteney v. Darlington* (x), money impressed with the qualities of realty had come by operation of law into the hands of the person (Lord Bath) solely entitled to it under the limitation in fee; and the person so entitled, without taking notice of the particular sum, devised all his manors, &c., which he was seised or possessed of, or to which he was in any wise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust moneys (except certain *locally* described estates therein mentioned) to his brother H. in fee, and gave him all the residue of his personal estate, and made him his executor. His brother H. subsequently, by his will, gave all his estates by *local* descriptions to certain uses therein mentioned, and all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, for certain trusts mentioned in his will. Subsequently to H.'s death, a bill was brought by the heir-at-law of Lord Bath to have the money laid out in land, but was dismissed. "If," said Lord Thurlow, "A. B. has in his possession £20,000 to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished;" and after citing and commenting upon the cases on the subject, his Lordship added, "The use I make of these cases, not-

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(x) 1 Bro. C. C. 223.

withstanding the dicta they contain, is this, that where a sum of money is in the hands of one without any other use but for himself, it will be money, and the heir cannot claim. . . . But whether this is clearly so or not, circumstances of demeanour in the person (even though slight) will be sufficient to decide it; a very little would do; receiving it from the trustees, there is no doubt would be sufficient. *Lord Bath did receive it; he had it in his hands.*" This decision was affirmed in the House of Lords (y); and as Lord Eldon says, "went no further than this, that if the property was *at home*, in the possession of the person under whom the heir and executor claimed, the heir could not take it; but if it stood out in a third person, he possibly might; and the question in that case was not upon the equity between the heir and executor, but whether the money was at home (z)."

Money impressed with real uses *at home* in the hands of the absolute owner descends as money.

But not if it be outstanding in hands of a third party.

(y) 7 Bro. P. C. Toml. Ed. 530.

(z) *Wheldale v. Partridge*, 8 Ves. 235. And see *Walrond v. Rosslyn*, *Walrond v. Fulford*, 11 Ch. Div. 640.

visions of the instrument, by renouncing the right to his own property in favour of B.; he must consequently make his choice, or, as it is technically termed, he is put to his election, to take either under or against the instrument.

Election,—  
derived from  
the civil law.

The doctrine of election, in common with many other doctrines of our courts of equity, appears to be derived from the civil law, or at all events to be not without its analogy in that law. For, in Roman law, a bequest of property which the testator knew to belong to another was not void; but a bequest on the erroneous supposition that the subject belonged to the testator, was, it seems, invalid (c). In the latter respect, the Roman law is different from the English law, for by the English law (which dislikes those fruitless and impossible inquiries with which the civil law abounded), whether the donor knew or not that the property he assumed to deal with was his own or not, if he has advisedly assumed to give it, then and in either case it is held that the donee is put to his election (d).

Two courses  
open to elect  
between,—

In the case already put, of A. giving to B. property belonging to C., and by the same instrument giving to C. other property belonging to A. himself, C. has two courses open to him to choose or to elect between,—

(1.) Election  
under instru-  
ment.

Either, 1stly, He may elect to take under the instrument, and consequently to conform to all its provisions. Here no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by A.

(2.) Election  
against the  
instrument.

Or, 2dly, He may elect against the instrument, in which case the question arises,—Does C., by refusing

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(c) See Just.'s Insts. ii. 24, 1.

(d) *Whistler v. Webster*, 2 Ves. Jr. 370.

to conform to the terms of the instrument, wholly forfeit his claim to the benefit intended to be conferred on him by that instrument, or does he forfeit only so much of that benefit under the instrument as is necessary to compensate B. for the disappointment he has suffered by C.'s election against the instrument?

To illustrate by a simple case. Suppose A, the testator, gives to B. a family estate belonging to C., worth £20,000 in the market, and by the same will gives to C. a legacy of £30,000 of his (A.'s) own property. C. is unwilling to part with his family estate, and therefore elects against the instrument. It has been held that, in such a case, viz., the election against the instrument, the principle of compensation, and not that of forfeiture, is to govern. In the case put, therefore, C. will retain his family estate and will also receive £10,000, portion of his legacy of £30,000, leaving to B. £20,000, other portion of the legacy of £30,000, to compensate him for the value of the estate of which he has been disappointed by C.'s election against the instrument. The conclusion from all the cases is summed up by Mr. Swanston in his note to *Gretton v. Haward* (c) as follows:—

Illustration,—  
showing that  
compensation  
and not for-  
feiture is the  
rule,—upon  
an election  
against the  
instrument.

1st, That in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefits intended for the refractory donee, in order to secure *compensation* to those whom his election disappoints.

2nd, That the surplus, after compensation, does not devolve, as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right.

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(c) 1 Swanst. 433; see also *Rogers v. Jones*, L. R. 3 Ch. Div. 688; *Pickersgill v. Rodger*, L. R. 5 Ch. Div. 163.



No election proper in cases where the testator makes two bequests of his own property in the same instrument.

It may be useful to warn the student carefully to discriminate this class of cases where a person disposes of that which is *not his own*, and confers on the real owner of that property some other benefits, from another apparently similar but in reality dissimilar class of cases, where a testator makes two or more separate devises or bequests of *his own* property in the same instrument. In this latter case, the gifts, whether beneficial or onerous, being both of them the property of the donor, the donee may take what is beneficial and reject what is onerous, unless it appear on the will that it was the intention of the testator to make the acceptance of the burden a condition of the benefit (f); but this class of cases does not fall properly within the equitable doctrine of election, and the student should accordingly wholly dismiss it from his mind.

There must be a fund from which compensation can be made, i.e., some property of donor's own.

As the doctrine of election depends on the principle of compensation, it follows that that doctrine will not be applicable where there is no fund from which compensation can be made. Or, speaking more accurately and plainly, the doctrine of election only properly arises where the donor, or pretending donor, really puts into his gifts, or pretended gifts, or some or one of them, some property that actually is his own, at the same time that he affects to give away the property of others. This will come out clearly upon contrasting the two next following cases:—

*Bristow v. Warde*,—case of donor not adding any property of his own.

Firstly, in the case of *Bristow v. Warde*(g), decided in 1794, it appeared that a father had the power of appointing certain moneys or stock (£6000 South Sea stock) among his children, and that the appointment-funds in question were given to the children in default of appointment by the father; it also appeared that the

(f) *Warren v. Rudall*, 1 J. & H. 13. And compare *Hawkins v. Hawkins*, 13 Ch. Div. 470.

(g) 2 Ves. Jr. 336. See also *In re Fowler's Trust*, 27 Beav. 362.

father by his will appointed portion of the funds to his children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees); and it also appeared that the father did not in or by his will give any property of his own to the children. The court held that the children might keep their appointed shares, and also take (as in default of appointment) the shares appointed to X., Y., and Z.; and that, in fact, the children were not bound to elect. "The doctrine of election," said the Lord Chancellor, "never can be applied; but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore, in all cases, there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that which he had power to distribute." On the other hand, in the case of *Whistler v. Webster* (h), also decided in 1794, it appeared that a father had the power of appointing certain moneys (£3000) among his children, and that the appointment-funds in question were given to his children in default of appointment by the father; it also appeared that the father by his will appointed portion of the funds to his children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees); but it also appeared that the father in and by his will gave also certain property of his own to the children. The court held that the children were bound to elect, keeping (if they chose) their appointed shares and the other benefits given to them in the will, and in that case not interfering with the shares improperly appointed to X., Y., and Z.; or else taking

*Whistler v. Webster*,—  
case of donor  
adding some  
property of  
his own.

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(h) 2 Ves. Jr. 367.

(if they chose) the entire appointment-fund to themselves, and out of the other benefits given to them by the will compensating X., Y., and Z. for the value of the shares improperly appointed.

Considerable difficulty often attaches to cases of election when complicated, as the two lastly before stated cases were, with special powers of appointment, and it becomes necessary therefore to consider with some particularity of detail the following group of election cases, that is to say,—

Election under powers.

(1.) As to person entitled in default of appointment, —a true case of election.

*Cases of election under the execution of powers.*

(a.) Where, under a special power, an express appointment is made to a stranger to the power, which is therefore void, and a benefit is conferred by the same instrument upon a person entitled in default of appointment, the latter will be put to his election. Thus, “where a man having a power to appoint to A. a fund which, in default of appointment, is given to B., exercises the power in favour of C., and gives other benefits to B., although the execution is merely void, yet if B. will accept the gifts to him, he must convey the estate to C., according to the appointment.”

(2.) As to person entitled under the power, —no case of election properly so called.

It has been said that where the donee of a power by the same instrument appoints to a stranger, and confers benefits out of his own property upon an object of the power, the latter will be put to his election (i). But it is submitted that in such a case the person who is the object of the power (not being also the person entitled in default of appointment) cannot with propriety be said to be put to his election, and for the following reasons. In order to raise a case of election, two essential circumstances, as we have seen, must concur :—

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(i) *Blacket v. Lamb*, 14 Beav. 482; 1 L. C. 389.

1st, That property which belongs to one person (A.) must be given to another person by the testator.

2d, That the testator at the same time gives to A. property of his (the testator's) own.

In such a case of concurrence, and only in such a case, A. would be put to his election.

Suppose then that A. is the object of the power, B. the person entitled in default of appointment to A., and X. is the person in whose favour the appointment is actually made. The appointment in favour of X. is clearly a bad appointment, and therefore the property would pass to B. as in default of appointment, and if the testator has conferred any benefits on B., he (B.) will be put to his election. But no property which *belongs to A.* has been given to X.; for A. is but a volunteer as regards the donee of the power, and until the donee has exercised his power over the fund in favour of A., it is not A.'s property; therefore, it is clear that an essential element to raise election as against A. is wanting. None of A.'s property has been given to another. But if A. had combined in himself both the character of the object of the power, and the person entitled to the fund in default (*i.e.*, if in the case put, A. and B. were the same individual), he would, if he had received any benefits from the donee of the power, be put to his election, not as A., the object of the power, but as *the person (B.) entitled in default of appointment (j).*

The student will, however, observe that in the case supposed of A. and B. being different persons, if A. gets any portion of the appointment-fund by any

But the same thing in effect.

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(j) *Whistler v. Webster*, 2 Ves. Jr. 367.

appointment thereof to him, he will be simply thankful for it and say nothing about what is appointed to X.; and if in addition A. gets also some property of the testator's own, he will simply be more thankful (in fact, A. will be doubly thankful), and again will say nothing about what is appointed to X. And that is all the author means by saying that A. will not be put to his election.

*Blacket v. Lamb*,—absolute appointment, with directions modifying the appointment,—When such directions are invalid.

When such directions are valid, and raise a case of election.

(b.) It has been decided "that where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed, in a manner which the law will not allow (*e.g.*, being attempts to evade the rule against perpetuities) (*k*), the court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes;" *i.e.*, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election (*l*). *On the other hand*, if the attempted modifications are in themselves such as the law will in ordinary cases allow, and are also sufficiently clear and imperative, amounting in substance to the creation of a trust or to a direct gift, then the question of election would arise, and would have to be answered upon the principles already explained. In other words, to cite the words of the Master of the Rolls in *Blacket v. Lamb* (*m*), "The question resolves itself into this, whether these words (meaning the precatory words in which it was attempted to modify the interests appointed to the children) amount to a direct appointment in favour of

(*k*) *Wollaston v. King*, L. R. 8 Eq. 165.

(*l*) *Woolridge v. Woolridge*, Johns. 63.

(*m*) 14 Beav. 482. And see the judgment of James, V.C., in *Wollaston v. King*, L. R. 8 Eq. 165.

the grandchildren. If they do amount to such an appointment, there is not, I think, any doubt but that a case of election is raised. But if, on the other hand, these precatory words are to be treated as anything short of an actual appointment, that is, if they do not form a portion of the appointment executed by the testator, in that case they must be treated as a condition or something extraneous to the appointment superadded to it; and if so, and if the superadded condition be inconsistent with the power, it is merely void, and no case of election will arise. I am of opinion, that if the words had been used by the testator with reference to a fund which was wholly within his own control to deal with *as he might think fit*, these words would have created a trust, and that his children, taking the gifts under the will of the testator, would have taken them charged with the duty of disposing of them according to that will; or, in other words, that a trust would have been created by implication in favour of the objects mentioned in the words of the gift, the execution of which this court would have enforced."

It would seem, accordingly, that where there is a clause of forfeiture of the legacies on non-compliance with any such attempted modification of the appointed interests, a case of election would be raised (n), assuming that the other conditions requisite for raising a case of election are present.

Questions of election have also arisen where a testator has attempted to dispose of his property by an instrument ineffectual for that purpose.

Ineffectual attempts to dispose of property by will, —examples of raising or not election,—  
(a.) Infancy.

(a.) *Infancy*.—No case of election will be raised where there is a want of capacity to devise real estate

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(n) *King v. King*, 15 Ir. Ch. R. 479; *Boughton v. Boughton*, 2 Ves. Sr. 12.

by reason of infancy. Thus, under the old law, where an infant whose will was valid as to personalty, but invalid as to realty, gave a legacy to his heir-at-law and devised real estate to another person, the heir-at-law would not have been obliged to elect between the legacy and the real estate, which descended to him in consequence of the invalidity of the devise: he might have taken both (o); that is to say, he might have kept the real estate coming to him by descent in spite of the will, and also have taken the personal estate coming to him under the will.

(b.) *Coverture.* (b.) *Coverture.*—Nor will a case of election arise if there is a want of capacity to make a will arising from coverture. Thus, where a *feme covert* made a valid appointment by will to her husband under a power, and also bequeathed to another person personal estate to which the power did not extend, the husband was not put to his election, but was held to be entitled to the benefit appointed to him under the power, and also to the property infectually bequeathed by his wife, to which he was entitled *jure mariti* (p). And the rule is the same where the will is valid at the time of execution, but afterwards becomes inoperative (q).

(c.) Wills before 1 Vict. c. 26.

(c.) Previous to the Wills Act, 1 Vict. c. 26, where a testator, by a will *not properly attested* for the devise of freeholds, but sufficient to pass personal estate, devised freehold estates away from the heir, and gave him a legacy, the question has arisen whether the heir-at-law was obliged to elect between the legacy and the freehold estate, which descended to him in consequence of the devise away from him being inoperative; it is clearly settled that he would not be obliged to elect (r),

(o) *Hearle v. Greenbank*, 3 Atk. 695, 1 Ves. Sr. 298; 1 Vict., c. 26, s. 7.

(p) *Rich v. Cockell*, 9 Ves. 369.

(q) *Blaklock v. Grindle*, L. R. 7 Eq. 215.

(r) *Shedden v. Goodrich*, 8 Ves. 481.

unless the legacy were given to him with an express condition that if he disputed or did not comply with the whole of the will, he should forfeit all benefit under it (s). On the other hand, if the will was *properly attested* for the devise of freehold estates, and the testator attempted to thereby dispose of *after-purchased lands*, which previous to the Wills Act, 1 Vict., c. 26, he could not effectually do, then the heir taking any personal estate under the will was bound to elect between that personal estate and such after-purchased lands so ineffectually attempted to be disposed away from him (t).

Where the Dower Act (3 & 4 Will. IV., c. 105) does not apply, that is, in the case of all widows married on or before the 1st January 1834, a widow may at law be put to her election by express words between her dower and a gift conferred on her (u). In equity she may be put to her election between dower and a gift conferred on her, by manifest (*i.e.*, necessary) implication, demonstrating the intention of the donor to exclude her from her legal right to dower; but this intention will not be implied unless the instrument contains provisions essentially inconsistent with the assertion of her right to dower. The question then arises, What is a gift essentially inconsistent with her assertion of that right? It has been long settled that a devise, by a testator to his widow, of *part* of the lands of which she is dowable, is not essentially inconsistent with her claim to dower out of the remainder (v). A devise of lands out of which the widow is dowable on *trust for sale*, is not essentially inconsistent with her claim to dower out of those lands, even though the interest of a part of the proceeds of the sale is

Election with reference to dower,—

(a.) At law,—express words.

(b.) In equity,—express words or necessary implication.

Necessary implication from concurrence of gift to widow with gift of other lands inconsistent with her right of dower.

(s) *Boughton v. Boughton*, 2 Ves. Sr. 12.

(t) *Schroder v. Schroder*, Kay, 578; Sugden's Concise View, 127.

(u) *Nottley v. Palmer*, 2 Drew. 93.

(v) *Lawrence v. Lawrence*, 2 Vern. 365.



given to her (w); nor will a mere gift of an annuity to the testator's widow, although charged on all the testator's property, be so essentially inconsistent with, as to exclude, her right to dower (x).

Example of a gift inconsistent with widow's right of dower.

The provisions which have generally been held to be essentially inconsistent with the widow's right to dower, are those which prescribe to the devisees a certain mode of enjoyment which necessitates their having the entirety of the property. Thus, in *Butcher v. Kemp* (y), where the testator, having devised a freehold farm, containing about 136 acres, to trustees and their heirs, during the minority of his daughter, directed them *to carry on the business of the farm, or let it on lease, during the daughter's minority*, and the testator devised other lands to his widow for her life, and also gave her specific and pecuniary legacies, it was held that the widow was put to her election. Sir John Leach, V.C., said, "The testator's plain intention is that the trustees should, for the benefit of his daughter, have authority to continue his business in the *entire* farm which he himself occupied, consisting of about 136 acres, and this intention must be disappointed if the widow could have assigned to her a third part of this land" (z).

*N.B.*—It is hardly necessary to mention, that dower under the recent Dower Act (where that Act applies) is of too fragile and defeasible a character to raise any questions about election.

The intention of the testator is to be sought for.

And speaking generally, in all cases whatsoever, in order to raise a case of election, there must appear on the will or instrument itself a clear intention on the

(w) *Ellis v. Lewis*, 3 Hare, 310.

(x) *Holdich v. Holdich*, 2 Y. & C. C. 19.

(y) 5 Mad. 61.

(z) *Miall v. Brain*, 4 Mad. 119; *Birmingham v. Kirwan*, 2 Sch. & L. 444.

part of the testator to dispose of that which is not his own, although (as we have seen) it is immaterial whether he knew the property not to be his own, or by mistake conceived it to be his own; if the intention in either case appears clearly, his disposition will be sufficient to raise a case of election (a), there being present of course the other requisites as above defined. On the other hand, if the intention does not clearly appear on the face of the will, but the words appearing to show the intention are capable of being otherwise satisfied, then there will arise no case for election.

Accordingly where the testator devises an estate in which he has a limited interest at law, the court will lean, as far as possible, to a construction which would make him deal only with that to which he is entitled, and not with that over which he has no disposing power, inasmuch as every testator must, *prima facie*, be taken to "have intended to dispose only of what he had power to dispose of; and, in order to raise a case of election, it must be clear that there was an intention on the part of the testator to dispose of what he had not the right or power to dispose" (b).

Where the testator has a limited interest, he is presumed to have given his own, and not to have attempted to give what was not his own.

Thus, in *Shuttleworth v. Greaves* (c), the wife of F. S. was the only child of A., who was entitled to certain shares in the Nottingham Canal, which upon A.'s death were transferred into the names of "F. S. and wife," the wife having been her father's administratrix. F. S. was afterwards, until his death, treated by the canal company as proprietor of the shares, and received the dividends upon them, and was elected to be, and also acted as, a member of a committee which, by the Company's Act of Parliament, was required to consist of proprietors of two or more shares. F. S.

*Shuttleworth v. Greaves*,—a case of shares in a specified company.

(a) *Stephens v. Stephens*, 1 De G. & J. 62; *Welby v. Welby*, 2 V. & B. 199.

(b) *Wintour v. Clifton*, 8 De G. M. & G. 651.

(c) 4 My. & Cr. 35.

by his will bequeathed what he called "all my shares in the Nottingham Canal Navigation," and all his personal estate to trustees, in trust for his wife for life, remainder over to his brothers and sisters absolutely. The testator had no such canal shares at all, unless those so transferred into the names of his wife and himself should be considered his. *Held*, that the words of the will amounted to a bequest of the particular shares before mentioned, and that the widow was bound to elect.

*Dummer v. Pitcher*.—a case of funded property generally.

On the other hand, in *Dummer v. Pitcher* (d), by the testator's will "he bequeathed the rents of his leasehold houses, and the interest of all his funded property or estate," upon trust for his wife for life, and after her decease, on trust to pay divers legacies of stock. The testator had, in fact, no funded property at the date of his will; but there was at that date funded property standing in the joint names of himself and his wife. After his death, the wife claimed, by survivorship, the funded property standing in the names of her husband and herself. It was contended that, as she took benefits under the will, she ought to be put to her election between those benefits and the funded property. It was held, however, that the widow ought not to be put to her election; that she took the stock by survivorship, and that the testator *not having expressed on the face of the will any intention to treat the stock in question as his own*, no question of election arose (e).

Evidence dehors the instrument,—not admissible to make out a case of election.

It is now clearly settled that parol evidence dehors the will is not admissible for the purpose of showing that a testator, considering property to be his own, which did not actually belong to him, intended to comprise it in a general devise or bequest. Thus, in *Clementson v. Gandy* (f), where parol evidence was

(d) 2 My. & K. 262.

(e) See *Ustick v. Peters*, 4 K. & J. 437.

(f) 1 Keen. 309.

tendered for the purpose of showing that the testatrix intended to pass, under a general bequest, certain property in which she had only a life-interest, supposing it to be her own absolutely, so as to put a legatee who had an interest in the property to his election, Lord Langdale refused to admit the evidence. "I am of opinion," observed his Lordship, "that this evidence cannot be admitted. It is tendered for the purpose of showing that the testatrix bequeathed property as her own which did not belong to her, and that she intended to leave a considerable residue for charitable purposes, which, by reason of that mistake, turns out to be much less than she is alleged to have intended; and it is argued that this raises a case of election. The intention to dispose must, in all cases, appear by the will alone. In cases which require it, the court may look at external circumstances, and consequently receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to except for the purpose of proving facts which make intelligible something in the will which, without the aid of extrinsic evidence, cannot be understood" (g).

(a.) *Married women.*—Although the practice as to the mode of election by married women has been somewhat fluctuating, an inquiry having occasionally been directed as to which interest was most beneficial for them, and they were then required to elect within a limited time after the result of the inquiry (h);—it is now considered a settled thing that a married woman can elect so as to affect her interest in real property at the least; and if she should desire to do so, she must signify her election by deed acknowledged (i). In one

Persons under disabilities.  
(1.) Married women,—they elect as to land by deed acknowledged; and as to money, by direction of court on inquiry.

(g) *Stratton v. Best*, 1 Ves. Jr. 285; *Smith v. Lyne*, 2 Y. & C. C. C. 345; *Honywood v. Forster*, 30 Beav. 14.

(h) *Davis v. Page*, 9 Ves. 350; *Wilson v. Townsend*, 2 Ves. Jr. 693.

(i) 3 & 4 Will. IV., c. 74, s. 77.

case where she had proposed to elect, but the deed was not acknowledged, it was stated by Wood, V.C., that the court could order a conveyance according to the purport of the unacknowledged deed, upon the ground that the married woman should not avail herself of her own fraud (*j*),—a ground the proof of which is always difficult in itself, and the necessity of proving it would, of course, involve the parties in a tedious action. Unfortunately, in the case of personal estate, a deed acknowledged is not always available; and in that case, the married woman is unable to elect, otherwise than under the direction of the court upon an inquiry as to which of the two things is the more beneficial for her (*k*).

(2.) Infants,  
—they wait  
till of age; or  
else elect  
by direction  
of court on  
inquiry.

(*b*). *Infants*.—With reference to infants also, the practice is not quite uniform, being of course adapted to the necessities of the case. Thus in *Streetfield v. Streetfield* (*l*), the period of election was deferred until the infant became of age; but in other cases there has been a reference to inquire what would be most beneficial to the infant (*m*), and the court has elected upon the result of the inquiry being certified.

(3.) Lunatics,  
—they elect  
by direction  
of court on  
inquiry.

(*c*). *Lunatics*.—With reference to lunatics, the practice is to refer it to chambers or to some official or agreed referee to certify or report (as occasionally in the case of infants) what would be most beneficial to the lunatic, and the court has elected upon the result of the inquiry being certified. *Semble*, the court would not defer the matter until the lunacy was superseded, unless, perhaps, where a supersedeas was in immediate prospect, or was in progress.

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(*j*) *Barrow v. Barrow*, 4 K. & J. 409; *Willoughby v. Middleton*, 2 J. & H. 344.

(*k*) *Cooper v. Cooper*, L. R. 7 H. L. 53; see *In re Robin's Estate*, W. N. 1879, 95.

(*l*) 1 L. C. 369.

(*m*) *Bigland v. Huddleston*, 3 Bro. C. C. 285 n.; *Ashburnham v. Ashburnham*, 13 Jur. 1111.

Persons compelled to elect are entitled previously to ascertain the relative value of their own property and that conferred upon them (*n*), and may file a bill to have all necessary accounts taken and inquiries made (*o*). An election made under a mistake of fact will not be binding, for in all cases of election, the court, while it enforces the rule of equity that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts, performed, perhaps, in ignorance or under a misapprehension of the value of the funds (*p*).

Privileges of  
persons com-  
pelled to elect.

Election may be either *express*, in which case no question can arise, or it may be *implied*. And in the latter case, considerable difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election; and this question must be determined (like any other question of fact) upon the circumstances of each particular case, and not on any general principle of law. It would be necessary to inquire into the circumstances of the property against which the election is supposed to have been made, for if a party, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take one and reject the other; and in like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own, as, for instance, by mortgaging it (particularly if this be done with the concurrence of the party entitled to call for an election), such dealing will be unavailable to prove an actual election as against the receipt of the rent of the other property (*q*). Any

What is  
deemed an  
election.

(*n*) *Boynton v. Boynton*, 1 Bro. C. C. 445.

(*o*) *Buttrecke v. Brodhurst*, 3 Bro. C. C. 88.

(*p*) *Wake v. Wake*, 3 Bro. C. C. 255; *Kidney v. Cousmaker*, 12 Ves. 136.

(*q*) *Padbury v. Clark*, 2 Mac. & G. 298.

acts to be binding upon a person must be done with the intention of electing (r).

Length of  
time raises  
presumption.

It is difficult to lay down any rule as to what length of time, after acts done from which election is usually implied, will be binding on a party, and prevent him from setting up the plea of ignorance of his rights (s). But, on the other hand, it must be remembered that a person may by his conduct suffer specific enjoyment by others until it becomes inequitable to disturb the rights that have meanwhile arisen (t).

A person who does not elect within the time limited, when a time is limited, will be considered as having elected to take against the instrument putting him to his election (u), *Semble*.

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(r) *Stratford v. Powell*, 1 Ball. & B. 1; *Dillon v. Parker*, 1 Swanst. 380, 387.

(s) *Reynard v. Spence*, 4 Beav. 103; *Sopwith v. Maughan*, 30 Beav. 235.

(t) *Tibbitts v. Tibbitts*, 19 Ves. 663.

(u) Decree in *Streetfield v. Streetfield*, 1 Swanst. 447; but see *Fytche v. Fytche*, L. R. 7 Eq. 494.

## CHAPTER XII.

## PERFORMANCE.

THE doctrine of performance is based upon the maxim of equity, which imputes an intention to fulfil an obligation ; in other words, that when a person covenants to do an act, and he does some other act that is capable of being applied towards a performance of his covenant, he shall be presumed to have had the intention of performing his covenant when he did the other act.

Equity imputes an intention to fulfil an obligation.

Under this subject two classes of cases occur.

I. Where there is a covenant to purchase and settle lands, and a purchase of lands is made, but is not expressed to be in pursuance of such covenant, and no settlement of the purchased lands is made.

II. Where there is a covenant to *leave* personalty, and the covenantor dies intestate, and thereby property comes in fact to the covenantee.

I. The doctrine upon the first branch of this subject was fully discussed in the leading case of *Lechmere v. Earl of Carlisle* (a). There Lord Lechmere, upon his marriage with Lady Elizabeth Howard, daughter of the Earl of Carlisle, covenanted to lay out within one year after his marriage £6000, her portion, and £24,000 (amounting in the whole to £30,000) in the

I. Covenant to purchase land, and land is purchased.

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(a) 3 Peere Wins. 211 ; Ca. t. Talb. 80.



purchase of *freehold lands in possession*, in the south part of Great Britain, with the consent of the Earl of Carlisle and the Lord Morpeth (the trustees), to be settled on Lord Lechmere for life, remainder for so much as would amount to £800 a year to Lady Lechmere, for her jointure, remainder to first and other sons in tail-male, remainder to Lord Lechmere, his heirs and assigns for ever; and Lord Lechmere also covenanted that until the £30,000 should be laid out in lands, interest should be paid to the persons entitled to the rents and profits of the lands when purchased. Lord Lechmere was seised of some lands in fee at the time of his marriage; and after his marriage he purchased some *estates in fee* of about £500 per annum, some estates *for lives*, and some *reversionary estates in fee* expectant on lives, and also *contracted* for the purchase of some estates *in fee in possession*; he then died intestate without issue, and without having made any settlement of any estate. None of the aforesaid purchases or contracts were made by Lord Lechmere with the consent of the trustees. Upon a bill being filed by Mr. Lechmere, the heir-at-law of Lord Lechmere, for specific performance of the covenant, and to have the £30,000 laid out as therein agreed, it was held by Jekyll, M.R., that he was entitled to specific performance of such covenant, and that none of the land which was permitted to descend to the heir was to be taken as part performance of the covenant. However, on appeal, Talbot, L.C., reversed the decree of the Master of the Rolls as to the *freehold* lands purchased and contracted to be purchased *in fee-simple in possession* after the covenant, though with but part of the £30,000, and left to descend; and these were declared to go in part performance of the covenant. His Lordship, after distinguishing and putting aside the question of *satisfaction* (b), which he said did not properly fall

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(b) *Wilcocks v. Wilcocks*, 2 Vern. 558.

within the case, continued as follows :—" As to all the

1. "estates purchased previously to the articles, there is no colour to say they can be intended in performance of the articles ; and as to the leaseholds for life, and the reversion in fee expectant on the estates for life, it
2. "cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee-simple in possession), why may they not be intended as bought with a view to make good the articles ? Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Parts of the lands purchased are in fee-simple in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles. It is objected that the articles say the land shall be conveyed immediately. It is not necessary that every parcel should be conveyed as soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles. Where a man is under an obligation to lay out £30,000 in land, and he lays out part as he can find purchases, which are attended with all material circumstances, it is more natural to suppose those purchases made with regard to the covenant than without it. *When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under than to a voluntary act independent of the obligation.*"

Deductions  
from *Lechmere*  
v. *Carlisle*  
(*Earl*).

From the exhaustive judgment above quoted, besides the principal point for which the case was cited, we may consider four other points in connection with this subject as well established:—

1. Performance may be good *pro tanto*.

1. Where the lands purchased are of less value than the lands covenanted to be purchased and settled, they will be considered as purchased in part performance of the covenant.

2. Previously purchased lands do not count.

2. Where the covenant points to a *future* purchase of lands, it cannot be presumed that lands of which the covenantor was seised at the time of the covenant, descending to his heir, were intended to be taken in part performance of it.

3. Lands purchased, if unsuitable, do not count.

3. It cannot be presumed that property of a different nature from that covenanted to be purchased by the covenantor was intended as a performance (c).

4. Trustee's consent to purchase, — want of, is immaterial.

4. Although by the settlement the consent of the trustee is required, still the absence of that consent will not necessarily prevent the presumption of performance from arising, if the other circumstances of the purchase are favourable to such presumption; and so immaterial is the absence of the trustee's consent, that in the case of *Sowden v. Sowden* (d), the doctrine of *Lechmere v. Earl of Carlisle* was extended to a case even where the covenant was to pay money to trustees, to be laid out by them in a purchase of land, and the covenantor himself purchased land, and took a conveyance to himself of the fee, and died intestate without having made a settlement.

It is to be observed, that a covenant to purchase

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(c) *Pennell v. Hallett*, Amb. 106.

(d) 1 Bro. C. C. 582.

lands generally is a mere specialty debt, and will not create a specific lien on the lands afterwards purchased, although the presumption may arise that they were purchased by the covenantor, intending them to go in performance of the covenant in his marriage articles; and, consequently, such a covenant will not affect a purchaser or mortgagee of the lands even with notice (e). But it might be otherwise if the covenant was to acquire and settle certain specified lands; and it would certainly be otherwise if the covenant was to settle specified lands already acquired by the covenantor (f).

Covenant to purchase does not create a lien on lands purchased.

It may be well to refer here briefly to a class of cases, occasionally referred to the head of performance, but distinguishable therefrom, and depending in fact upon the rule that the *cestui que trust* of a fund is entitled to follow that fund into any subject-matter into which it may have been wrongfully converted. In the case of *Trench v. Harrison* (g), the trustees of a marriage settlement being empowered by it to invest the trust funds in freeholds or copyholds of inheritance, with the consent of the husband and wife, authorised the husband to purchase a certain estate as an investment of part of the trust funds, and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent. It was held, nevertheless, that as between the husband and the trustees, he must be considered to have purchased the estate for them. These cases of following trust money into land have some resemblance to the

Right of *cestui que trust* to follow trust fund,—distinguished from performance.

(e) *Deacon v. Smith*, 3 Atk. 323.

(f) *Mornington v. Keane*, 2 De G. & J. 292.

(g) 17 Sim. 111; and see *Taylor v. Plumer*, 3 Maul. & Selw. 562.

case of performance, properly so called; but in essentials they differ materially. In the case of performance the husband is under an obligation to purchase the land, while in the cases of following trust money the husband is under no such obligation, and therefore all turns on the circumstance that the purchase was in fact made with trust money, with regard to which it is a well-settled rule that the money may, in most cases, be followed into the land in which it is invested (*h*).

II. Covenant to pay or leave by will, and share under the Statute of Distribution.

II. The second class of cases ranked under the head of performance is where a husband covenants to leave his wife a gross sum of money or part of his personalty, and he dies intestate, so that she becomes entitled to a portion of his personal property under the Statute of Distributions. The question sometimes arises, whether such distributive share is a performance of the covenant, or whether she can claim both the distributive share and the money due under the covenant. The solution of this question depends on the two following rules, which the cases on the point suggest:—

(1.) When husband's death occurs at or before time when the obligation accrues, distributive share a performance.

I. When the death of the husband occurs at the time, or previous to the time, when the obligation ought, by the terms of the covenant, to be performed, her distributive share will be taken as a performance of the covenant, *pro tanto* or *in toto*, as that share is, on the one hand, less than, or, on the other hand, equal to, or greater than, the sum due under the covenant.

*Blandy v. Widmore*,—  
a case of per-

Thus, in *Blandy v. Widmore* (*i*), A. covenanted, previously to his marriage, to leave his intended wife £620.

(*h*) *Lench v. Lench*, 10 Ves. 511.

(*i*) 2 L. C. 391.

The marriage took place, and the husband died intestate. The wife became entitled to a moiety amounting to more than £620 of her husband's personal property under the Statute of Distributions. The Lord Chancellor held that this was a performance of the covenant, on the following ground—that the covenant was to be taken as *not broken*, for the husband had left his widow £620 and upwards; that, therefore, she could not come in first as a creditor for the £620 under the covenant, and then for a moiety of the surplus under the statute. Similarly, in the case of *Goldsmid v. Goldsmid (j)*, it was decided, on the authority of *Blandy v. Widmore*, that where the trusts of a testator's will failed, and his property became divisible as in case of intestacy, the widow's distributive share under the statute was a performance of the covenant by the husband under the marriage articles, that his executors should, after his death, pay her a certain sum of money. In his judgment, Sir T. Plumer, M.R., makes the following observations:—"Lord Eldon, in *Garthshore v. Chalie (k)*, speaking of *Blandy v. Widmore*, and other cases, says, 'These cases are distinct authorities that where a husband covenants to leave or to pay at his death a sum of money to a person who, independent of that agreement, by the relation between them and the provision of the law attending upon it, will take a provision, the covenant is to be construed with reference to that.' Considering the contract as made with that reference, it must be interpreted as intended to regulate what the widow is to receive, and consequently when the event of intestacy ensues, the single question is, Does she not obtain that for which she contracted? If the object of the covenant is that the executors of the husband shall pay to the widow a given sum, and in her character of widow, created by the same marriage

formance in  
loto, where an  
immediate  
intestacy.

*Goldsmid v. Goldsmid*,—  
the same  
where a result-  
ing intestacy.

(j) 1 Swanst. 211.

(k) 10 Ves. 1.

contract, she in fact obtains from the executor or administrator that sum, the court is bound to consider that as payment under the covenant. *These are not cases of an ordinary debt; during the life of the husband there is no breach of the covenant, no debt; the covenant is to pay after his death, and the inquiry is not whether the payment of the distributive share is satisfaction, but a question perfectly distinct, whether it is performance.*"

(2.) Where husband's death occurs after obligation accrues, distributive share not a performance.

2. Where the decease of the husband occurs after the obligation of the covenant has already arisen, or, in other words, after a breach of such covenant, the widow's distributive share is not a performance of the obligation.

Thus in *Oliver v. Brickland* (1), the husband covenanted to pay a sum *within two years* after marriage, and if he died his executors should pay it. He lived *after the two years* and died intestate, leaving a larger sum than what he covenanted to pay, to devolve upon his widow as her distributive share. The Master of the Rolls held that she was entitled both to the money under the covenant and to her distributive share of the residue. Here it will be seen that *there was a breach of covenant* before the death, and that from the moment of such breach a *debt* accrued due to the covenantee; whereas in the first class of cases the obligation to pay did not arise until the time at which the distributive share devolved.

Performance distinguished from satisfaction.

Finally, it must be observed, that whereas in satisfaction the presumption will not hold (at least, in the case of creditors) where the thing substituted is less beneficial either in amount, or certainty, or time of

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(1) Cited 1 Ves. Sr. 1; 3 Atk. 420.

enjoyment, or otherwise, than the thing contracted for ; in performance the thing done, even though less beneficial in amount, certainty, &c., than the thing contracted to be done, will, other circumstances concurring, be taken as performance *pro tanto* of the covenant (*m*).

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(*m*) Cox's note to *Blandy v. Widmore*, 1 P. Wms. 323.



## CHAPTER XIII.

## SATISFACTION.

Satisfaction  
supposes in-  
tention.

AN important distinction exists between satisfaction and performance. Satisfaction, it is true, like performance, supposes intention; nevertheless, in satisfaction, the thing done is something different from the thing covenanted to be done, and is, in fact, a *substitute* for the thing covenanted to be done; whereas in performance, the *identical* act which the party contracted to do is considered to have been done (a).

The cases on the doctrine of satisfaction may be divided into *four* classes.

- I. Satisfaction of debts by legacies.
- II. Satisfaction of legacies by subsequent legacies.
- III. Satisfaction of legacies by portions.
- IV. Satisfaction of portions by legacies.

I. Of debts by  
legacies.

I. Satisfaction of debts by legacies.

The general rule is, "that if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as, or greater than, the debt, without taking any notice at all of the debt, this shall nevertheless be in satisfaction of the debt, so that he shall not have both the debt and the legacy" (b). And this presumption is founded upon the maxim,

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(a) *Goldsmid v. Goldsmid*, 1 Swanst. 211.

(b) *Talbot v. Shrewsbury*, Prec. Ch. 394; 2 L. C. 352.

*Debitor non presumitur donare.* But the presumption is not favoured by the court, and the court's leaning against the presumption has led it to lay hold of trifling circumstances in order to exclude the presumption altogether. Presumption not favoured.

From the various cases on the subject may be collected the following rules:— Rules.

1. Words ordinarily employed to grant a legacy show an intention of favour rather than an intention to fulfil an obligation, *i.e.*, "a legacy imports a bounty." 1. Legacy imports bounty.

2. If the debtor bequeaths exactly the same sum, *simpliciter*, as the debt, it will be taken as a satisfaction. *Debitor non presumitur donare* (c). 2. If legacy be equal to debt.

3. If the legacy be less than the debt, it has never been held to go in satisfaction, even *pro tanto* (d). 3. If legacy be less than debt.

4. The legacy of a sum, *simpliciter*, greater than the debt will be taken as a satisfaction of the debt, and only imports bounty as to the excess of the legacy over the debt (e). 4. Legacy greater than debt.

5. The presumption will not be raised where the debt of the testator was contracted subsequently to the making of the will; for the testator could have no intention of making any satisfaction for what was not at the time in existence (f). 5. Debt contracted after will.

6. Equity will lay hold of slight circumstances to indicate an intention that the legacy shall not go as a satisfaction. A few cases will illustrate how strong 6. Circumstances rebutting the presumption.

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(c) *Haynes v. Mico*, 1 Bro. C. C. 130.  
 (d) *Eastwood v. Vinke*, 2 P. Wms. 617.  
 (e) *Talbot v. Shrewsbury*, 2 L. C. 352.  
 (f) *Cranmer's Case*, 2 Salk. 508.

the leaning in equity is against the presumption of satisfaction.

Direction in will for payment of debts and legacies.

Where there is an express direction in the will for payment of *debts AND legacies*, the court will, it seems, infer that it was the intention of the testator that both the debt and the legacy should be paid to his creditor. Thus, in *Chancey's case (g)*, A., being indebted for wages to a maid-servant who had lived with him a considerable time, give her a bond for £100, and in the consideration of the bond it appeared to be for *wages*. Afterwards by his will he gave her a legacy of £500, stating in his will that it was "*for her long and faithful service*;" and he directed *that all his debts AND legacies should be paid*. It was held, that the legacy was not a satisfaction of the debt due on the bond, and the maid-servant had both her debt and her legacy. The court said that the testator, by the express words of his will, had devised "*that all his debts and legacies should be paid*;" and this £100 being then a *debt*, and the £500 being a *legacy*, it was as strong as if he had directed that both the bond and the legacy should be paid. But it is doubtful whether a direction to pay debts *alone* will be sufficient to rebut the presumption of satisfaction. In *Edmunds v. Lowe (h)*, Wood, V.C., held that a charge of debts standing alone was not sufficient; nevertheless, the weight of authority seems to be in favour of the proposition that, if not absolutely sufficient in itself to rebut the presumption, such a charge is at least a strong circumstance against the presumption of satisfaction (i).

Direction to pay debts alone.

Time for payment of legacy differing from that of debt.

Another ground for avoiding the presumption of the satisfaction of a debt by a legacy arises where the time

(g) 1 P. Wms. 408; 2 L. C. 353. (h) 3 K. & J. 318, 321,  
(i) *Rowe v. Rowe*, 2 De G. & Sm. 297, 298; *Russel v. Hankins*, 7 W. R. 314; *Cole v. Willard*, 25 Beav. 568; *Pinchin v. Simms*, 30 Beav. 119; *Glover v. Hartcup*, 34 Beav. 74.

1. A fixed for the payment of the legacy is different from the time when payment of the debt is demandable. Thus, in *Clarke v. Sewell* (j), the testator gave a legacy of £10,000 to his mother, to be paid by the trustees *one month* after his decease. The mother was entitled to £2000 from the estate of her son, in consequence of his having succeeded to the stock-in-trade of his father, and payment of this £2000 was demandable immediately upon the death of the son. It was held that there was no satisfaction; that in order to be so deemed, the £10,000 legacy ought to have become payable immediately on the testator's death, at which time the debt due from the son to the mother became payable; whereas the legacy was to be paid *one month after* the testator's death (k). On the other hand, in *Wathen v. Smith* (l), where the legacy was payable at an earlier date than the money due under the settlement, and was therefore to the greater advantage of the legatee-creditor, it was held that the presumption of satisfaction arose.

3. Where the legacy is contingent or uncertain, it will not be held a satisfaction of a debt. Thus, in *Barret v. Beckford* (m), a testator being under an obligation to pay an annuity to A., by his will gave the *residue* of his property to his mother and A. for life. It was held that this legacy of a moiety of the residue to A. was not a satisfaction of the annuity to A.; that in order that the gift should be deemed a satisfaction, it was necessary that the subject-matter of the gift and the debt should be exactly of the same nature, and of equal certainty. From the case of *Devese v. Pontet* (n), it will be seen that a gift by will of a residue to a wife will not be a satisfaction of a debt due to her, and that the rule of *Blandy v. Widmore* in cases of

Contingent  
legacy.

(j) 3 Atk. 96.

(l) 4 Mad. 325.

(k) *Haynes v. Mico*, 1 Bro. Ch. Ca. 129.

(m) 1 Ves. Sr. 519.

(n) 1 Cox, 188.

## EXCLUSIVE JURISDICTION.

applicable to cases where there is an

law used to hold, and English, common  
that a payment may be *less* in any one  
viz. *res*,—i.e., in amount; *loco*,—i.e., in  
of place; *tempore*,—i.e., in time; and  
in quality.

like distinctions were familiar in English law,  
the foregoing cases of the court's leaning against  
would be resolvable into one case, namely,  
legacy of *less* than the debt.

11. Satisfaction of legacies by subsequent legacies.  
Two classes of cases occur under this head, viz :—

(a.) Where the legacies are by the same instru-  
ment.

(b.) Where the legacies are by different instru-  
ments.

Under the  
same instru-  
ment,  
equal  
legacies are  
substitutive.

(1.) Where legacies of quantity in the *same* instru-  
ment, whether a will or codicil, are given to the same  
person *simpliciter*, and are of equal amount, one only  
will be good, nor will small differences in the way in  
which the gifts are conferred afford internal evidence  
that the testator intended they should be cumulative.  
Thus, in *Greenwood v. Greenwood* (p), the testatrix gave  
"to her niece, Mary Cook, the wife of John Cook,  
£500," and afterwards in the same will, amongst  
many other legacies, "to her cousin, Mary Cook,  
£500 for her own use and disposal, notwithstanding  
her coverture." It was held that Mary Cook was en-  
titled to one legacy only of £500, and that the same  
was for her separate use.

(o) *Bartlett v. Gillard*, 3 Russ. 149.

(p) 1 Bro. C. C. 31. n.

Where, however, the legacies given by the *same* instrument are of unequal amount, they will be considered cumulative (q). (b.) Unequal legacies are cumulative.

(2.) Where a testator by *different* testamentary instruments has given legacies of quantity *simpliciter* to the same person, the court, considering that he who has given more than once must *prima facie* mean more than one gift, awards to the legatee all the legacies, and it is immaterial whether the subsequent legacy differs or not in any particulars from the prior one (r). (2.) Under different instruments, legacies, whether equal or unequal, are cumulative.

But though the legacies are in different instruments, if they are not given *simpliciter*, but the motive of the gift is expressed, and in such instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that the testator did not by a subsequent instrument mean another gift, but only a repetition of the former gift (s). Unless same motive expressed and same sum.

But the court raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments. For if in either instrument there be, on the one hand, no motive, or a *different* or *additional* motive expressed, and the sum be the *same* in both instruments (t), or, on the other hand, though the *same motive* be expressed in different instruments, yet the sums are different (u), the presumption will be in favour of cumulation rather than of substitution. Where, however, a second instrument expressly refers to the first, or where by intrinsic evidence the latter instrument was a mere revision, ex-

(q) *Hooley v. Hatton*, 1 Bro. C. C. 390 n. ; *Curry v. Pile*, 2 Bro. C. C. 225 ; *Yockney v. Hansard*, 3 Hare, 620.

(r) *Rock v. Callen*, 6 Hare, 531 ; *Russell v. Dickson*, 4 H. L. Cas. 293.

(s) *Benyon v. Benyon*, 17 Ves. 34.

(t) *Rock v. Callen*, 6 Hare, 531 ; *Ridges v. Morrison*, 1 Bro. C. C. 388.

(u) *Hurst v. Beach*, 5 Mad. 352 ; *Baby v. Miller*, 1 E. & A. 218.

1. In question of presumption admissible
2. " " " Construction not "

planation, or copy of the former, it will so far be held substitutional (v).

Extrinsic evidence,—when admissible and when not.

As to the question when extrinsic evidence is receivable in favour of or against the presumption, the authorities seem to lead to the following conclusions (w).

Where the court raises the presumption,—evidence to confirm instrument admissible.

(a.) That where the court itself raises the presumption against double legacies—where, for instance, two legacies of equal amount are given by one instrument, parol evidence is admissible to show that the testator intended the legatee to take both, for that is in support of the apparent intention of the will, and is in fact in restoration of the plain effect of the instrument.

Where the court does not raise the presumption,—no evidence to contradict instrument admissible.

(b.) But where the court does not raise the presumption,—where, for instance, legacies of equal amount are given *simpliciter* by different instruments—parol evidence is not admissible to show that the testator intended the legatee to take one only, for that is in opposition to the will, and is in destruction of the plain effect of the instrument. Parol evidence being therefore excluded in this case, the question becomes one solely of construction (x).

III. and IV.  
Satisfaction of legacy by portion, and vice versa.

III. The satisfaction, or, as it is more correctly termed, the ademption (y) of a legacy by a portion; and,

IV. The satisfaction of a portion by a legacy.

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(v) *Fraser v. Byng*, 1 Russ. & My. 90; *Coots v. Boyd*, 2 Bro. C. C. 521; *Currie v. Pye*, 17 Ves. 462; and see *Whyte v. Whyte*, L. R. 17 Eq. 50.

(w) 2 L. C. 335.

(x) *Hurst v. Beach*, 5 Mad. 351; *Hall v. Hill*, 1 Dr. & War. 94; *Lee v. Pain*, 4 Hare, 216.

(y) "When the will is made first, and the settlement afterwards, it is always treated as a case of what is called ademption—that is to say, the benefits given by the settlement are considered to be an ademption of the same benefits given to the same child by the will.

"With reference to cases . . . of a previous settlement and a

"Where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the court understands him as giving a portion, and by a sort of artificial rule—in the application of which legitimate children have been very harshly treated—upon an artificial notion, and a sort of feeling called a leaning against double portions—if the father advances a portion on the marriage of that child, the portion is presumed to be an ademption of the legacy *pro tanto* or *in toto*, as the money advanced is respectively less than, or equal to, or greater than the sum expressed to be given as a legacy" (2). General rule.

The following observations apply generally as well to the ademption of a legacy by a portion as to the satisfaction of a portion by a legacy:—

1. In the case of double provisions, the doctrine of satisfaction does not in general apply to legacies and portions to strangers, but only where the parental relation or its equivalent exists. If, therefore, a person give a legacy to a mere stranger, and then make a settlement on that stranger; or first agree to make a settlement on that stranger, and then bequeath a legacy to him; the stranger is entitled to claim under both instruments: and for the purpose of this doctrine it is settled that an illegitimate child is in the eye of the law a stranger; and that, unless other circumstances are found than the bare relation of parentage "by nature," the illegitimate child is at liberty to claim a double provision (a). Rule does not apply as to legacies and portions to a stranger, including (for this purpose) an illegitimate child.

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subsequent will . . . it is now quite settled that there is no difference between the two cases, beyond the verbal difference that the term satisfaction is used where the settlement has preceded the will, and the term ademption where the will has preceded the settlement. In substance there is no distinction between the principles applied to the two classes of cases."—*Coventry v. Chichester*, 2 H. & M. 159.

(2) *Pym v. Lockyer*, 5 My. & Cr. 29.

(a) *Ex parte Pye*, 18 Ves. 140.



Unless the legacy and portion be for the same specific purpose.

But the general rule will apply, though the testator stands neither in the legal nor assumed relation of a parent to the legatee, if the legacy be given for a particular purpose, and the testator advances money for the same purpose (b).

The presumption against double portions is founded on good sense.

The presumption against double portions has been characterised as a hard and artificial rule, but, on examination, it will appear to be founded on good sense and justice. In *Suisse v. Louther (c)*, Wigram, V.C., makes the following remarks:—"The rule of presumption, as I before said, is against double portions as between parent and child; and the reason is this—a parent makes a certain provision for his children by will, if they attain twenty-one, or marry, or require to be settled in life; he afterwards makes an advancement to a particular child. Looking at the ordinary dealings of mankind, the court concludes that the parent does not, when he makes that advancement, intend the will to remain in full force, and that he has satisfied in his lifetime the obligation which he would otherwise have discharged at his death; and having come to that conclusion, as the result of general experience, the court acts upon it, and gives effect to the presumption that a double provision was not intended. If, on the other hand, there is no such relation either natural or artificial, the gift proceeds from the mere bounty of the testator; and there is no reason *within the knowledge of the court* for cutting off anything which has in terms been given. The testator may give a certain sum by one instrument, and precisely the same sum by another; there is no reason why the court should assign any limit to that bounty, which is wholly arbitrary. The court, as between strangers, treats several gifts as *prima facie* cumulative. The consequence is,

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(b) *Monck v. Monck*, 1 Ball. & B. 303; *Pankhurst v. Howell*, L. R. 6 Ch. 136.

(c) 2 Hare, 435.

as Lord Eldon observed, that a natural child, who is in law a stranger to the father, stands in a better situation than a legitimate child, for the advancement in the case of the natural child is not, *prima facie*, an ademption." But this anomaly is an accidental consequence of the rule, and the reasons of the rule, which are good in themselves, cannot be affected by what is accidental. Moreover, it can very seldom happen that the anomaly will have its operation; because the rule against double portions will apply even in the case of an illegitimate child, if it be shown that the testator has put himself *in loco parentis* (d).

2. The next general proposition is, that although the doctrine of satisfaction does not, as a general rule, apply where the donee is a stranger, it may and does apply where the donor has placed himself "*in loco parentis*" towards the beneficiary.

The presumption applies where the donor has placed himself *in loco parentis* to the donee.

As to what constitutes the *quasi-parental* relation, which is signified by the words "putting one's self *in loco parentis*," the case of *Powys v. Mansfield* (e) is in point. There the question arose whether Sir John Barrington, who had by his will given £10,000 to one of his nieces, and had afterwards settled £10,000 on the marriage of the same niece, stood "*in loco parentis*" to the niece, so as to give rise to the application of the doctrine of satisfaction. The niece was one of the daughters of Sir John's brother, Fitzwilliam, and the general relations subsisting between the uncle and his nieces were thus stated in the evidence: "That Sir Fitzwilliam, in compliance with the wishes of Sir John, resided near Sir John, in the Isle of Wight, and maintained a more expensive establishment than his (Sir Fitzwilliam's) income (which did not exceed £400 a year) would allow of; that Sir John and his brother

What is putting one's self *in loco parentis*.

(d) *Laves v. Laves*, 20 Ch. Div. 81.

(e) 6 Sim. 544; 3 My. & Cr. 359.

lived on the most affectionate terms with each other; that for several years Sir John gave his brother £1000 a year; that he took the greatest interest in his nieces, behaved to them as a father, and always acted to them as the kindest of parents, not showing more partiality to one than to another; that he frequently gave them pocket-money, and made them other presents, and occasionally advanced money to defray the expense of their clothing and education; that he allowed them to use his horses and carriages, and had them frequently to dine with him, and that one or other of them was almost always staying at his house; that he was consulted as to the appointment of their masters and governesses, and as to the marriages of such of them as were married; and that on the plaintiff's marriage the terms of the settlement were negotiated between the plaintiff and Sir John and their respective solicitors, without any interference on the part of Sir Fitzwilliam." Upon these facts, the Lord Chancellor Cottenham, reversing the decision of the Vice-Chancellor Grant, held that Sir John had placed himself "*in loco parentis*," making the following observations:—"The authorities leave in some obscurity the question as to what is to be considered as meant by the expression "*'in loco parentis.'*" Lord Eldon, however, in *Ex parte Pye*, has given to it a definition which I readily adopt. He says it is a person meaning to put himself *in loco parentis*, in the situation, that is to say, of the person described as the lawful father of the child, with reference to the office and duty of such father to make provision for the child. The Vice-Chancellor says it must be a person who has so acted towards the child as that he has thereby imposed on himself a moral obligation to provide for it, and that the designation will not hold where the child has a father with whom it resides, and by whom it is maintained. This seems to infer that the *locus parentis* assumed by the stranger must have refer-

The parent of the child may be alive.

"ence to the pecuniary wants of the child, and that "Lord Eldon's definition is to be so understood, and I "so far agree with it; but I think the other circumstances required are not necessary to work out the "principle of the rule or to effectuate its object. The "rule, both as applied to a father and one *in loco* "*parentis*, is founded upon the presumed intention. A "father is supposed to intend to do what he is in duty "bound to do—namely, to provide for his child according to his means. So, one who has assumed that part "of the office of a father is supposed to intend to do "what he has assumed to himself the office of doing. "If the assumption of the character be established, the "same inference and presumption must follow. The "having so acted towards a child as to raise a moral "obligation to provide for it, affords a strong inference "in favour of the fact of the assumption of the character; and the child having a father with whom it "resides and by whom it is maintained, affords some "inference against it; but neither inference is conclusive" (*f*).

3. Whereas in the case of satisfaction of a debt by a legacy, equity leans (as we have seen) most strongly against the presumption, the leaning of the court is all the other way in the case of satisfaction of portion by legacy or of legacy by portion. In this latter case the presumption of satisfaction will not be repelled "by slight circumstances of difference between the advance and the portion," just as the like differences in the case of alleged satisfaction of debt by legacy would not repel, but would (as we have seen) confirm the contrary leaning of the court in that case against satisfaction. And even very material differences do not seem to count. Thus, in the case of *Lord Durham v.*

(3.) Leaning  
against double  
portions.

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(*f*) *Cooper v. Cooper*, 21 W. R. 501.

*Wharton* (g) a father by will bequeathed £10,000 to trustees, one-half to be paid at the end of three years, and the other half at the end of six years from his death, with interest in the meanwhile, and declared the trusts to be for his daughter for life, and after her decease in trust for her children, as she should appoint by deed or will, and in default of appointment for all her children equally; and subsequently, on the marriage of the daughter, he agreed to give her £15,000, to be paid to the intended husband, he securing by his settlement pin-money and a jointure for his wife, and portions for the younger children of the marriage. It was held that the £10,000 legacy was satisfied by the £15,000 portion. It is to be observed how strong this decision was. By the will, the daughter took a life-interest; by the settlement, a jointure. By the will *all* the children of the daughter took; by the settlement, portions were provided only for the younger children of the particular marriage.

Same principles applicable when settlement comes before will.

And the same principles will be applied not only where, as in the above case, the will precedes the settlement, but where the order of events is, first, a settlement, secondly, a will. This was decided in the case of *Thynne v. Glengall* (h). There a father having, upon the marriage of his daughter, agreed to give her a portion of £100,000 consols, made an actual transfer of one-third therefore to the *four trustees* of the marriage settlement, and gave them his bond for the transfer of the remainder in like stock upon his death; the stock to be held by them in trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards by his will gave to

(g) 3 Cl. & F. 146; but see *Tussaud v. Tussaud*, 9 Ch. Div. 363.

(h) 2 H. L. Cas. 131; see also *Russell v. St. Aubyn*, L. R. 2 Ch. Div. 398; *Mayd v. Field*, L. R. 3 Ch. Div. 587; *Bethell v. Abraham*, L. R. 3 Ch. Div. 590, 591 n.

two of the trustees a moiety of the *residue* of his personal estate in trust for the daughter's separate use for life, remainder for *her* children generally as *she* should by deed or will appoint. And it was held that the moiety of the residue given by the will was a satisfaction of the sum of stock not yet actually transferred, *the loan are in my possession* being the portion thereof secured by the bond, and this notwithstanding the differences of the trusts. With reference to this subject, the following remarks were made in the House of Lords:—"We must throw out of consideration all the cases in which questions have arisen as to legacies being or not being held to be in satisfaction of a debt; for, however similar the two cases may appear at first sight, the rules of equity, as applicable to each, are absolutely opposed the one to the other. Equity leans against legacies being taken in satisfaction of a debt, but leans in favour of a provision made by will being in satisfaction of a portion by contract, feeling the great improbability of a parent intending a double portion for one child, *to the prejudice generally, as in the present case, of other children.* In the case of a debt, therefore, small circumstances of difference between the debt and legacy are held to negative any presumption of satisfaction; whereas, in the case of portions, small circumstances are disregarded. So in the case of a debt, a smaller legacy is not held to be in satisfaction of part of a larger debt; but in the case of portions, it is held to be a satisfaction *pro tanto*. In the case of a debt, a gift of the whole or part of the residue cannot be a satisfaction, because it is said, the amount being uncertain, it may prove to be less than the debt. In considering whether this rule applies to portions, which is the only question in this case, the reason of the rule as applicable to debts must not be lost sight of, because as a portion may be satisfied *pro tanto* by a smaller legacy, the reason given for the rule as applicable to debts cannot apply to portions. And, on the contrary, as the residue

Not a question  
of satisfaction  
of a debt.

must be supposed by the testator to have been of some value, it would appear on principle that it ought to be considered as a satisfaction either altogether or *pro tanto*, according to the amount. For why should £1000 given as a residue not have the same effect upon a larger portion as £1000 given as a money legacy?"

Where settlement comes first, persons taking under it are *quasi-purchasers*, with right to elect between the settlement and the will.

It will be seen that there is no objection in principle to the application of this doctrine where the will precedes the settlement, and the trusts are dissimilar; yet in the case where the settlement comes first, a difficulty necessarily arises. For, in this latter case, the persons entitled under the settlement are *quasi-purchasers*, and as such cannot be deprived against their will of their rights upon any presumed intention of the testator. At the utmost, they can only be put to election whether to take under the will or under the settlement, and the presumption against double portions will be much more easily rebutted than where the will precedes the settlement. The distinction is thus stated by Lord Cranworth in his judgment in *Chichester v. Coventry* (i): "When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, 'I mean this to be in lieu of what I have given by my will.' But if the settlement precedes the will, the testator must be understood as saying, 'I give this in lieu of what I am already bound to give, if those to whom I am so bound will accept it.' It requires much less to rebut the latter than the former presumption." And, in fact, in the before-stated case of *Thynne v. Glengall*,—the settlement in that case having preceded the will,—an inquiry was directed whether it was for the benefit of the daughter and her children to take under the will or under the settlement, and she was to elect accordingly.

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(i) L. R. 2 H. L. 87; but see *Bennett v. Houldsworth*, L. R. 6 Ch. Div. 671.

A It is also to be observed that in *Thynne v. Glengall* the question of satisfaction arose only regarding the *untransferred* stock; and, in fact, the principle of satisfaction does not apply at all *as regards advances actually made* upon a settlement or other advancement previously to the will (j).

It was for some time an unsettled point as to whether, if the sum given by a second instrument was smaller than that given by the first, the less sum operated as a total satisfaction of the larger. This question can of course be of practical value only where the will precedes the settlement; for where the order is reversed, and the settlement comes first, the rights of those taking under a positive contract such as a settlement is, cannot be affected or modified by subsequent voluntary gifts. It was for a long time considered that the settlement of a smaller portion effected a complete ademption of a larger legacy given by a previous will. But it was left to Lord Cottenham in the case of *Pym v. Lockyer* (k), to establish the true and logical rule that an advancement subsequent to a will, if less in amount than the sum given by the will, was to be considered a satisfaction *pro tanto* only.

Where a parent gives a legacy to a child to whom he is already *indebted*, the case stands on the same footing as a legacy by any other person in satisfaction of a *debt*, not being a portion; hence a subsequent legacy will not, in the absence of intention, express or implied, be considered as a satisfaction of the debt, unless it be either equal to or greater than the debt in amount, and unless the presumption of satisfaction be not repelled by any of those slight circumstances which will take a bequest of such amount to a

Sum given by second instrument, if less, satisfaction *pro tanto*.

Legacy to a child to whom father is indebted.

(j) *Watson v. Watson*, 33 Beav. 574; *Re Peacock's Estate*, L. R. 14 Eq. 236; *Hatfield v. Minet*, 8 Ch. Div. 136.

(k) 5 My. & Cr. 29.



stranger out of the general rule (l). And the same rules apply to a legacy to a wife to whom the husband is indebted (m).

Advancement  
by father to  
child to whom  
he is indebted.

Where a parent, however, being indebted to his child, makes in his lifetime an advancement to the child upon marriage, or upon some other occasion, of a portion equal to or exceeding the debt, it will *prima facie* be considered a satisfaction; and it is immaterial whether the portion be given in consideration of natural love or affection, or whether in the case of a portion to a daughter, the husband be ignorant of the debt. Thus, in *Wood v. Briant* (n), a father administrator *durante minore etate* of his daughter, who was executrix and residuary legatee of her grandmother's estate, agreed when she married with the plaintiff that she should have £800, which in the settlement was called her portion. Lord Hardwicke refused to decree an account of the grandmother's personal estate, as she had been dead twenty years; but directed that the father's representatives should account for his personal estate as to the £800 only, and interest at four per cent. from the marriage (o). Lord Hardwicke said, "There are very few cases where a father will not be presumed to have paid the debt he owes to his daughter, when in his lifetime he gives her in marriage a greater sum than he owed her, for it is very unnatural to suppose that he would choose to leave himself a debtor to her, and subject to an account."

Extrinsic  
evidence,—  
question of its  
admissibility  
or non-  
admissibility.

★ As to "extrinsic evidence."—The rule against double portions is a presumption of law, and, like other presumptions of law, may be rebutted by evidence of extrinsic circumstances, i.e., evidence of facts not con-

(l) *Stocken v. Stocken*, 4 Sim. 152.

(m) *Fowler v. Fowler*, 3 P. Wms. 353; *Cole v. Willard*, 25 Beav. 568.

(n) 2 Atk. 521; and see *Laves v. Laves*, 20 Ch. Div. 81.

(o) *Hayes v. Garvey*, 2 J. & L. temp. Sugd. 268; *Plunkett v. Lewis*, 3 Hare, 316.

tained in the written instrument itself. The rules on this subject may be gathered from the cases of *Hall v. Hill* (p) and *Kirk v. Eddowes* (q). In *Hall v. Hill* (1.) To vary or contradict the plain effect of document, where there is no presumption of law contrary to that effect,—extrinsic evidence is not admissible,—*Hall v. Hill*. the facts were as follows:—The testator, on the marriage of his daughter, intended to provide a sum of £800 as her portion, and gave a bond for the sum to the husband, payable by instalments, part thereof to be paid during his life, and the residue upon his decease, and afterwards by his will bequeathed to his daughter a legacy of £800. Parol evidence was tendered on the part of the defendants to show what was the real intention of the testator. The question was,—whether the parol evidence was admissible. The Lord Chancellor said:—"There is no doubt of the general rule "that *when by presumption you come to a construction against the apparent intention of the instrument, that may be rebutted by parol evidence*. What am I to do "in the present case? Here the debt was first incurred, and then comes the will. The legacy to the "daughter by that will could not, by the general rules "of the court, be held to be a satisfaction of the debt. "The will gives a legacy simply. The law says that "this legacy is not in satisfaction of the previous debt. "I am asked now to insert in the will a declaration by "the testator which I do not find in it, namely, that he "means the legacy to be a satisfaction of the debt. "I am of opinion I can do no such thing."

In *Kirk v. Eddowes* (r), a father bequeathed (2.) To confirm the plain effect of the document, where there is a presumption of law contrary to that effect,—extrinsic evidence is admissible,—*Kirk v. Eddowes*. £3000 for the separate use of his daughter for life, with ulterior trusts for her children. Subsequently he gave the daughter and her husband a promissory-note for £500. The defendants alleged the £500 to have been intended as a satisfaction *pro tanto* of the legacy of £3000, and tendered parol evidence, consisting of the declarations of the testator

(p) 1 Dr. &amp; War. 94.

(q) 3 Hare, 509.

(r) *Ibid*.

at the time of handing over the note, that it was to be in part satisfaction of the legacy of £3000. The question was,—whether these contemporaneous declarations were to be admitted, it being observed that in this case the law did raise a presumption of partial satisfaction. Wigram, V.C., held that this evidence was admissible, and on the following grounds:—“If a second instrument do not in terms adeem the first, but the case is of that class in which, from the relation between the author of the instrument and the party claiming under it (as in the actual or assumed relation of parent and child), or on other grounds, *the law raises a presumption that the second instrument was an ademption of the gift by the instrument of earlier date*, evidence may be gone into to show that such presumption is not in accordance with the intention of the author of the gift; *and where evidence is admissible for that purpose, counter-evidence is also admissible*. In such cases the evidence is NOT admitted on either side for the purpose of proving in *the first instance* with what intent either writing was made, *but for the purpose only of ascertaining whether the PRESUMPTION which the law has raised be well or ill founded*. . . . The evidence does not touch the will, it proves only that a given transaction took place after the will was made, and proves what that transaction was, and calls upon the court to decide whether the legacy given by the will is not thereby adeemed. *Ademption of the legacy, and not revocation of the will*, is the consequence for which the defendant contends” (s).

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(s) See further, upon the admissibility of extrinsic evidence, Wigram's *Extrinsic Evidence in Interpretation of Wills*, 4th edit., 1858.

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## CHAPTER XIV.

## ADMINISTRATION OF ASSETS.

WHERE a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, it often becomes material to consider the order and sometimes the proportions and mode in which the several classes of property are applicable to the liquidation of his debts. Every description of property, whether it be real or whether it be personal estate, is now liable for the payment of debts; but for various reasons, some of them historical, and others of them merely natural, certain species of property are liable before others. When regarded in its relation to this general liability to debts, property is called *assets*, and assets again have been distinguished as *legal* and as *equitable* assets. Administration.

*Legal assets* was the name used to denote such portions of the property of a deceased person as were available at common law for the payment of his debts, and with which accordingly the executor or administrator was chargeable as such in an action by a creditor of the deceased testator as intestate. 1. Legal assets.

Where, however, the assets were such as were available *only* in a court of equity, they were termed *equitable assets*. 2. Equitable assets.

The true distinction between legal and equitable assets was thus laid down by V.C. Kindersley in *Cook*

v. *Gregson* (a): "The general proposition is clear enough, that when assets may be made available in a court of law, they are legal assets, and when they can only be made available through a court of equity, they are equitable assets. This proposition, however, does not refer to the question whether the assets can be recovered by the executor in a court of law or in a court of equity.

Distinction referred to the creditor's remedies.

Legal assets were those recoverable by the executor *virtute officii*, and with which he was therefore chargeable in an action at law by a creditor.

*The distinction refers to the remedies of the creditor, and not to the nature of the property.* If a creditor brings an action at law against the executor, and the executor pleads, *plenè administravit*, the truth of the plea must be tried by ascertaining what assets the executor has received, *and whatever assets the court of law, in trying that question, would charge the executor with*, must be regarded as legal assets. . . . I think the general principle is, that a court of law would treat as assets every item of property come to the hands of the executor, which he has recovered, or had a right to recover, merely *virtute officii*, i.e., which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof."

Legal and equitable assets,—importance of distinction between, formerly and at present.

The distinction between legal and equitable assets was formerly much more important than it is now, that importance consisting in this, viz., that out of legal assets debts of different degrees, as being either specialty or simple contract debts, were payable in certain defined priorities in a due course of administration, that is to say, the specialty before the simple contract debts; but out of equitable assets these two different degrees of debts were payable *pari passu* without any priority the one over the other. And this appears to be all that was meant when it was (inaccurately) stated that out of equitable assets *all* debts were payable *pari passu*. Also, where the court had to deal with a mixed

(a) 3 Drew. 549; and see *Hilliard v. Fulford*, L. R. 4 Ch. Div. 389; *Job v. Job*, L. R. 6 Ch. Div. 562.

fund of legal and equitable assets, and specialty creditors by virtue of their legal priority had exhausted the legal assets, the court, on the ground that he who seeks equity must do equity, would marshal the equitable assets in favour of the simple contract creditors by paying thereout the debts of the latter up to an equality with the specialty creditors, before proceeding to a *pari passu* distribution of the residue of the equitable assets (b). However, the distinction has recently lost much of its importance, an Act having been passed in 1869 to abolish the priority of specialty over simple contract debts (c), in the administration of the legal assets of deceased persons whose deaths shall have happened on or after the 1st January 1870. And under the Supreme Court of Judicature Act, 1875 (hereinafter mentioned), a still greater equality in the payment of debts has been introduced in the case of people dying insolvent on or after the 1st November 1875.

In cases, however, which do not fall within the Act of 1869, that is to say, in the case of persons dying before the 1st January 1870, the following was the order in which the different species of debts were payable out of legal assets:—

The order of priority in the payment of debts,—out of legal assets, as regards deaths before 32 & 33 Vict., c. 46.

1. Debts due to the Crown by record or specialty (d).
2. Debts to which particular statutes give priority (e), e.g., income-tax (f), poor-rates (g).
3. Judgments duly registered (h), and unregistered

(b) *Plunket v. Penson*, 2 Atk. 290; *Bain v. Sadler*, L. R. 12 Eq. 570; and see *Ashley v. Ashley*, L. R. 1 Ch. Div. 243; 4 Ch. Div. 757.

(c) Stat. 32 & 33 Vict., c. 46.

(d) 2 Inst. 32.

(e) See 17 Geo. II., c. 38, s. 3; 58 Geo. III., c. 73, ss. 1, 2; 18 & 19 Vict., c. 63, s. 23; 4 & 5 Will. IV., c. 40, s. 12; and *Moors v. Marriott*, 7 Ch. Div. 543.

(f) *Re W. J. Henley & Co. Limited*, 26 W. R. 885.

(g) *In re Booth, Fisher v. Shirley*, W. N. 1879, 108.

(h) Stat. 2 & 3 Vict., c. 11; 18 & 19 Vict., c. 15; 23 & 24 Vict., c. 38, ss. 3, 4, 5; 27 & 28 Vict., c. 112, s. 1.

judgments, if recovered against the personal representatives (i).

4. Recognisances and statutes.

5. Debts by specialty contracts, for valuable consideration, whether the heir be, or be not, bound (j), arrears of rent service, even though the rent be reserved by parol, ranking equally with specialties (k).

6. Debts by simple contract, unregistered judgments against the deceased only ranking *pari passu* with debts by simple contract (l).

7. Voluntary bonds; but if a voluntary bond had been assigned for value, at any rate in the life of the obligor, it would, in the administration of assets, stand on the same footing as a bond originally given for value, that is to say, in the fifth group of debts (m).

The order of priority in the payment of debts,—out of *equitable* assets and also (under the Act of 1869) out of *legal* assets.

By running together into one and the same group of debts, the debts comprised in the fifth and the sixth of the above-mentioned groups, you obtain the order in which the different species of debts were always payable out of *equitable* assets; and in cases where the recent Act of 1869 lastly before mentioned applies, the order last mentioned is also the order in which the different species of debts are now payable out of *legal* assets also,—the effect of that Act (wherever it applies) being to abolish in every administration action the distinction between legal and equitable assets (n).

Executor may prefer one creditor to another, although of different degrees,—until decree or receiver or injunction.

The priority above specified is that which is observed where the assets are applied in a due course of administration; but there is nothing to prevent an executor,

(i) *Re Williams*, L. R. 15 Eq. 270; *In re Stubbs*, *Hanson v. Stubbs*, 8 Ch. Div. 154; *Smith v. Morgan*, 5 C. P. D. 337.

(j) 9 Co. 88 b.

(k) Com. Dig. Admin., c. 2; *In re Hastings*, *Shirreff v. Hastings*, L. R. 6 Ch. Div. 610.

(l) *Re Turner*, 12 W. R. 337; 23 & 24 Vict., a. 38; *Kemp v. Waddingham*, L. R. 1 Q. B. 355.

(m) *Ramsden v. Jackson*, 1 Atk. 294; *Payne v. Mortimer*, 4 De G. & J. 447.

(n) *Job v. Job*, L. R. 6 Ch. Div. 562.

even to the present day, paying one creditor (although of an inferior degree) before any other creditor (although of a superior degree), or even paying a statute-barred debt (*o*),—at least at any time before decree in an administration action, when no receiver of the estate has been appointed or injunction obtained (*p*). In order to prevent such preferential payment, it is necessary either to obtain an injunction or the appointment of a receiver in the action before decree, or else to obtain a speedy consent decree for administration (*q*).

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It is not worth while to enumerate all the varieties of legal assets; but it may be usefully noticed here, that lands not charged with the payment of debts were for the first time made liable at all in an administration action for the payment of debts generally in 1833, and were made *legal* assets, although to be administered only in equity, by the statute 3 & 4 Will. IV., c. 104, which extended to deceased non-traders, the remedy given in 1807 by the statute 47 Geo. III., c. 74, against deceased traders. The statute 3 & 4 Will. IV., c. 104, enacts that the real estate of a deceased person, "which he shall not by his last will have charged with, or devised subject to, the payment of his debts, shall be administered in courts of equity, for the payment of the just debts of such person, as well debts due on *simple contract*, as on *specialty*." But the Act preserved the rights of creditors by specialty in which the heirs were bound as regarded estates devolving by descent; and the Act also further provided that, in the administration of real estate made liable by the Act, such last-mentioned creditors should be paid in full in priority to simple contract creditors and creditors by specialty in which

I. Legal assets,—enumeration of.

(*o*) *In re Greaves, Bray v. Tofteld*, 18 Ch. Div. 551.

(*p*) *Darston v. Lord Orford*, Prec. Ch. 188; *In re Radcliffe*, 7 Ch. Div. 733.

(*q*) *In re Stubb's Estate, Hanson v. Stubb*, 8 Ch. Div. 154.



the heirs were not bound. But the Act of 1869 (where it applies) has clearly abolished the priority that was preserved by the Act 3 & 4 Will. IV., c. 104, as between at least these different species of creditors themselves. It may also be noticed that estates *pur autre vie* are likewise *legal* assets, although the executor may have to go into a court of equity in order to obtain them (r); also, that the equity of redemption of a sum of money charged on land (s) and also of leaseholds, is *legal* assets in the hands of the executor.

II. Equitable  
assets, —  
varieties of.

*Equitable assets are of two kinds, viz. :—*

Either (1.) Equitable assets which are so by virtue of their own nature and character. They are not attainable by the executor *virtute officii*, and are not chargeable against the executor in an action at law by a creditor; or rather they were not so chargeable prior to the Judicature Acts, 1873-75; but, *semble*, the executor would now be chargeable with them even at law.

Or (2.) Equitable assets which are so created by the act of the testator, *e.g.*, by charging or devising his land for the payment of his debts.

I. Equitable  
assets by na-  
ture of pro-  
perty itself,—  
enumeration  
of.

I. Equitable assets which are so by the nature and character of the property, and which are not attainable by the executor, *virtute officii*, consist of the following properties, viz. :—

(a.) Property  
actually ap-  
pointed in  
exercise of  
general power.

(a.) Property over which the testator has exercised a general power of appointment is equitable assets (t).

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(r) *Christy v. Courtenay*, 26 Beav. 140.

(s) *Cook v. Greyson*, 3 Drew. 547; *Mulloy v. Mulloy*, 4 De G. & J. 539; *Wms. on Assets*, 6.

(t) *Pardo v. Bingham*, L. R. 6 Eq. 485.

(b.) The separate estate of a married woman is administered as equitable assets, all her creditors being paid *pari passu*, because it is only through a court of equity that they can make her separate property available (u). Such property has, in fact (or at least prior to the Judicature Acts, 1873-75, had, in fact), no existence in the view of a court of common law, unless so far as regards statutory separate estate.

(b.) Separate estate of married woman.

2. The second kind of equitable assets is that created by the act of the testator charging or devising his land for the payment of his debts (v).

2. Equitable assets by act of testator,—enumeration of.

Besides a great difference in the order of administration (w), to be hereafter noticed, there is an important distinction between an *express* devise of lands on trust for the payment of debts, and a mere charge of debts upon the lands. When a trust of lands is created, the conscience of the trustee is affected; the creditor is put under his care, and it becomes the special duty of the trustee to look after him; and it has always been the rule of equity, and under the Judicature Act, 1873, sect. 25, sub-sect. 2, it is now a rule in all the courts, that as between an express trustee and his *cestui que trust*, no length of time is a bar (x). But if the creditors have merely a charge upon the lands in their favour, they must look after themselves, for otherwise they would have been barred after twenty years by the statute of limitations, 3 & 4 Will. IV., c. 27, s. 40 (y), and they would now be barred after

Charge of debts distinguished from trust.

See p. 272

In a trust for payment of debts, lapse of time no bar.

In a charge, creditors may be barred by lapse of time.

(u) *Bruere v. Pemberton*, cited as *Anon.*, 18 Ves. 258; *Owens v. Dickenson*, Cr. & Ph. 48, 53; *Murray v. Barlee*, 3 My. & K. 209; *In re Poole's Case*, *Thompson v. Bennett*, L. R. 6 Ch. Div. 739.

(v) 3 & 4 Will. IV., c. 104.

(w) *Harmood v. Oglander*, 8 Ves. 124.

(x) *Hughes v. Wynne*, Turn. & Russ. 309; *Townshend v. Townshend*, 1 Cox. 29, 34; 3 & 4 Will. IV., c. 27, s. 25; 36 & 37 Vict., c. 60, s. 25, § 2.

(y) *Jacquet v. Jacquet*, 27 Beav. 332; but see Real Property Limitation Act, 1874 (37 & 38 Vict., c. 57, s. 8), reducing the twenty years to twelve.

twelve years by the present Real Property Limitations Act. But note, that if a testator bequeath his personal estate upon an express trust for the payment of his debts, the statutes of limitation still run against the creditors,—the reason being that such a bequest is in effect inoperative, seeing that the personal estate is, by law, primarily liable to the payment of the debts, and the testator, by professing to create a trust of it for that purpose, does nothing, or merely does that which the law has already done (2). But note also, that a trust of *personal* estate, even for payment of debts, when the trust is created by deed (and not by *will*), is an effectual express trust, against which length of time is no bar.

What amounts  
to a charge of  
debts.

A  
A general  
direction by  
testator for  
payment of  
his debts.

In order to prevent the injustice which, previously to the statute 3 & 4 Will. IV., c. 104, many times resulted to creditors in consequence of a testator not having charged his debts upon his real estate, courts of equity, by straining a little the ordinary rules of construction, laid it down as a rule in this class of cases, that a mere general direction by a testator that his debts should be paid effectually charged them on his real estate; and such rule of construction is still in practice in the courts, notwithstanding that the original occasion for it has either ceased altogether or been minimised. Thus, in *Legh v. Earl of Warrington* (a), a testator commenced a will thus:—"As to my worldly estate, I give and dispose thereof in manner following: (that is to say), *Imprimis*, I will that all my debts which I shall owe at the time of my decease be discharged and paid out of my *estate*;" and he then disposed of his real and personal estate, charging the former with an annuity. The House of Lords, affirming a decree of Lord King, held the real estate to be charged with the debts. And it is not necessary that such ex-

(2) *Scott v. Jones*, 4 Cl. & Fin. 382; and see 3 & 4 Will. IV., c. 27, s. 40.

(a) 1 Bro. P. C., Toml. ed. 511.

pressions as "*Imprimis*" should be at the beginning of the will; for, as observed by Shadwell, V.C., in *Graves v. Graves* (b), "if a testator directs his debts to be paid, is it not in effect a direction that his debts shall be paid in the first instance?"

There are, however, certain exceptions to this general rule, viz:—

1st, Where the testator, after a general direction for the payment of his debts, has specified a particular fund for the purpose; "because the general charge by implication is controlled by the specific charge made in the subsequent part of the will" (c).

1. Where testator has specified a particular fund for payment of debts.

2d, Where the debts are directed to be paid by the executors, who are not at the same time devisees of the real estate (d); for, in that case, it will be presumed that the debts are to be paid exclusively out of the assets which come to them as executors.

2. Where executors, not being also devisees, are directed to pay the debts.

A direction to raise money for payment of debts out of rents and profits of real estate will authorise the sale or mortgage of the estate for that purpose (e).

Debts to be paid out of rents and profits.

Where a person has a direct lien upon the lands as mortgagee or otherwise, his right of priority will not be affected by any such general charge of debts (f); and it is to be here observed that neither debts by specialty, in which the heirs are bound, nor simple contract debts, even since 3 & 4 Will. IV., c. 104, constitute a lien or charge upon the land (g).

Lien on land not affected by a charge of debts.

Neither specialty nor simple contract debts are a lien on the lands.

(b) 8 Sim. 55.

(c) *Thomas v. Britnell*, 2 Ves. Sr. 313; *Price v. North*, 1 Ph. 85.

(d) *Cook v. Dawson*, 3 De G. F. & J. 127; *Finch v. Hattersley*, 3 Rus. 345 n.

(e) *Bootle v. Blundell*, 1 Mer. 232; *Metcalf v. Hutchinson*, L. R. 1 Ch. Div. 591; *In re Brooke, Brooke v. Rooke*, L. R. 3 Ch. Div. 630; and see *Child & Co. v. Thorley*, 16 Ch. Div. 151.

(f) *Child v. Stephens*, 1 Vern. 101, 103.

(g) *Morley v. Morley*, 5 De G. M. & G. 610; *Carter v. Saunders*, 2 Drew. 248; *Kinderley v. Servis*, 22 Beav. 1.

Administration under the Judicature Act, 1875 (38 & 39 Vict., c. 77), s. 10.

By the Supreme Court of Judicature Act, 1875, it is enacted that "in the administration by the court of the assets of any person who may die after the commencement of this Act (h), and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies' Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

Rights of secured creditors.

In bankruptcy, a secured creditor may either,—(1.) Rest on his security and compel the trustee to redeem him, or (2.) may realise his security, or apply to have it realised under the direction of the court (i); and in the event of the security proving deficient, he can prove for the deficiency only. The former rule in equity was, that the creditor might, in addition to his rights under his security, prove for the whole amount of his debt against the general estate (j).

Secured creditors,—who are, and who are not.

A landlord, in respect of his arrears of rent, is not (in the winding up of companies) a secured creditor within the meaning either of the Bankruptcy Act, 1869, or of the Judicature Act, 1875 (k); but a judg-

(h) *Sherwen v. Selkirk*, 12 Ch. Div. 68, disapproving *Hilton v. Jones*, 9 Ch. Div. 620.

(i) Robson on Bankruptcy, 277; *In re Suche & Co.*, L. R. 1 Ch. Div. 48. And see *Ex parte Bagshawe*, in *re Ker*, 13 Ch. Div. 304; *Ex parte Newton*, ex parte Griffin, in *re Bunyard*, 16 Ch. Div. 330; *Williams v. Hopkins*, 18 Ch. Div. 370; *Couldery v. Bartrum*, 19 Ch. Div. 394.

(j) *Kellock's Case*, L. R. 3 Ch. App. 769.

(k) *In re Coal Consumers' Co.*, ex parte Hughes, 25 W. R. 300; *In re Printing and Numerical Co.*, 8 Ch. Div. 535; *In re Bridgewater Engine Co.*, 12 Ch. Div. 181; *Thomas v. Patent Lionite Co.*, 17 Ch. Div. 250.

ment creditor who has obtained a garnishee order is a secured creditor (*l*); also, a judgment creditor who has obtained the appointment of a receiver in an action for administration commenced by him (*m*); and likewise the holder of a bill of sale, although unregistered (*n*).

The precise effect of the 10th section of the Judicature Act, 1875, has been, and to some extent still is, a matter of doubt. Its apparent intention was to introduce the rule of bankruptcy as regards secured and unsecured creditors; and so far its meaning, as above expounded, is comparatively free from doubt. But the section also extends to the "debts and liabilities provable," and to the valuation of "contingent liabilities," &c.; and it is over these words that the doubt arises regarding the true construction of the section. It has been held that the rule in bankruptcy giving local rates priority over the other debts of the bankrupt does not apply in the winding up of a company (*o*), and therefore, *semble*, not in an administration of assets; also, that the rule in bankruptcy avoiding executions for £50 or over, when the sheriff has notice within fourteen days after the levy, does not apply to the winding up of a company (*p*); also, that the doctrine of bankruptcy regarding reputed ownership does not apply to a winding up (*q*). And although it has been held that in bankruptcy all debts, including even voluntary bonds (*r*), are now payable *pari passu*, other than and except of course crown debts to which the Bankruptcy Act, 1869, does not apply

Bankruptcy rules,—how far introduced into administration of insolvent estates.

(*l*) *Ex parte Joselyne, in re Watt*, 8 Ch. Div. 327.

(*m*) *Ex parte Evans, in re Evans*, 13 Ch. Div. 252.

(*n*) *In re Knott*, 7 Ch. Div. 549 n.; *Tadman v. D'Epineuil*, 20 Ch. Div. 217.

(*o*) *In re Albion Steel and Wire Co.*, 7 Ch. Div. 547.

(*p*) *In re Richards & Co.*, 11 Ch. Div. 676; *Withernsea Brick Works Co.*, 16 Ch. Div. 337, overruling *In re Printing and Numerical Co.*, 8 Ch. Div. 535; but see *In re Vron Colliery Co.*, 20 Ch. Div. 442.

(*q*) *In re Crumlin Viaduct Works Co.*, 11 Ch. Div. 755; and see *Moor v. Anglo-Italian Bank*, 10 Ch. Div. 681.

(*r*) *Ex parte Pottinger, in re Stewart*, 8 Ch. Div. 621.

(s), and other than and except debts which are by the Bankruptcy Act, 1869, expressly assigned a priority, yet it has also been held that the priority which a judgment creditor was entitled to in the administration of the assets of a deceased person under a decree in an administration suit is not affected by the 10th section of the Judicature Act, 1875, whether the judgment is registered or not (t). On the other hand, it has been held that the rule in bankruptcy that servants' wages shall be paid in priority to all other debts is by the 10th section extended to the winding up of a company (u), and therefore also, *semble*, to an administration of an insolvent estate in the Court of Chancery; and the rule for the valuation of contingent liabilities does undoubtedly apply (v); also, in the administration of an insolvent estate to which the Judicature Act, 1875, applies, a creditor on the estate whose debt bears interest is not entitled to interest up to the day of payment, but only to the date of the judgment for administration, which, by virtue of the 10th section of the Act, is equivalent to the adjudication in bankruptcy (w); also, so long as there are assets, creditors may come in and prove, not disturbing any prior dividend, in administration as in bankruptcy (x); and there is the like distinction in administrations as in bankruptcy between the principal administration of assets and the administrations ancillary thereto in foreign countries (y).

Legatees postponed to creditors.

The maxim "equality is equity" is not extended to legatees jointly with creditors. Thus, although land may be devised in trust for, or charged with the pay-

(s) *Ex parte P.M.*, in *re Benham*, 10 Ch. Div. 595; *In re Maggi, Winehouse v. Winehouse*, 20 Ch. Div. 545.

(t) *Smith v. Morgan*, 5 C. P. Div. 337.

(u) *In re Association of Land Financiers*, 16 Ch. Div. 373.

(v) *In re Bridges, Hill v. Bridges*, 17 Ch. Div. 342.

(w) *In re Summers, Boswell v. Gurney*, 13 Ch. Div. 136.

(x) *In re Metcalfe, Hicks v. May*, 13 Ch. Div. 236.

(y) *Eames v. Hacon*, 16 Ch. Div. 407; on app. 18 Ch. Div. 347.

ment of debts and legacies, the debts will in all cases have precedence of the legacies, on the ground that a man must first do what is just before he attempts what is generous. On the other hand, legatees and devisees, as being express objects of a testator's generosity or bounty, are respectively preferred to the next of kin and to the heir-at-law of the testator; and among legatees, residuary legatees are considered the least objects of such express generosity, although it is otherwise with residuary devisees, for these latter rank on the same level as other devisees (2).

*And y devisee having been held specific*

From these and such-like considerations the courts have established in the administration of assets the following order in the liability to debts of the different properties (but as between such properties themselves only) belonging to the testator at the time of his decease, that is to say,—

Order of the liability to debts of the different properties of testator,—as between such properties themselves only.

1. The general personal estate not bequeathed at all or by way of residue only. *Story*

2. Real estate devised for the payment of debts. *2 Story*

3. Real estate descended. *(but not charged)* 3 "

4. Real estate devised specifically or by way of residue, and being at the same time charged with the payment of debts. 4 "

5. General pecuniary legacies, including annuities, and including also demonstrative legacies which have become general. *5. h. Real estate devised by Residue*

6. Specific legacies (including demonstrative legacies that have remained demonstrative) and real estate devised specifically or by way of residue, and not being at the same time charged with debts. *6. Pecuniary legacies*

7. Personalty or realty subject to a general power of appointment, and which power has been actually *7. Story*

(2) *Walker v. Meager*, 2 P. W. 551; *Kidney v. Cousmaker*, 12 Ves. 154; *Hooper v. Smart*, L. R. 1 Ch. Div. 90; *Roper v. Roper*, L. R. 3 Ch. Div. 714.



exercised by deed (in favour of volunteers) or by will (a).

### 8. Paraphernalia of widow.

1. The general personal estate,—primary liability of.

Question,—  
What exonerates the personality?

*N. 13.*

Answer,—  
There must be both a discharge of the personality and a charge of the realty.

1. The general personal estate, not bequeathed at all, or by way of residue only, and which is in general legal assets, is first liable. But of course the testator may have exonerated it from its primary liability, and such exoneration may be either express or implied. Thus, if the testator has appropriated any specific part of his personal estate for the payment of his debts, and has also disposed of his general residuary personal estate, the part so appropriated will be primarily liable to the payment of the debts in exoneration of the general residuary estate. It requires, however, very clear language on the part of the testator to exonerate his general personal estate from its primary liability to the payment of his debts; and to do this at the expense of the real estate, he must show an intention not only to charge his real estate with his debts, but also to exonerate his personal estate therefrom. Thus neither a general charge of the debts upon the real estate, nor an express trust created by the testator for the payment of his debts out of his real estate, or any part thereof (b), will be sufficient to exonerate the personal estate from its primary liability to pay them. But if the personal estate be given to some legatee, and more particularly if the articles given be specifically mentioned, the indication thus afforded of the testator's wish that the personality shall come clear to the legatee, will, if coupled with an express trust for payment of the funeral and testamentary expenses or of the debts out of the real estate, be sufficient to exonerate the personality (c). On the other hand, if the personality be

(a) *In re Van Hagen*, *Spurling v. Rockfort*, 16 Ch. Div. 18.

(b) *Tower v. Rous*, 18 Ves. 132; *Collis v. Robins*, 1 De G. & Sm. 131; *Brydges v. Phillips*, 6 Ves. 570.

(c) *Greene v. Greene*, 4 Mad. 148; *Lance v. Aglionby*, 27 Beav. 65.

simply given to the executor, or if the gift be merely of the residue of the personal estate, the personal estate will not be exempt (*d*). In short, an intention must appear to give the personal estate *as a specific legacy* to the legatee; and if this be the case, it will be exempt, and will be removed to that distant rank in point of liability in which all specific devises and bequests are held to stand (*e*).

By Locke King's Act (*f*), the rule that the personalty of a testator is the primary fund for the payment of his debts was broken in upon with respect to mortgage debts. This Act enacts, that "when any person shall, after the passing of the Act, die seised of or entitled to any estate or interest in any land or other hereditaments, which shall, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will, or deed, or other document, *have signified any contrary or other intention*, the heir or devisee to whom such lands or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person; but the lands or hereditaments so charged shall, *as between the different persons claiming* (*g*) *through or under the deceased person*, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof." The Act is not, of course, to prejudice the mortgagee's right to payment out of the personal estate; but the Act, unless excluded, applies to every person claiming under a will, deed, or document dated on or after the 1st of January 1855.

Exoneration  
of general personal estate  
from mortgage debts.  
By 17 & 18 Vict.,  
c. 113 (Locke  
King's Act),  
mortgaged  
estate primarily liable.

not Legatee  
: Leasehold  
not included

(*d*) *Aldridge v. Wallscourt*, 1 Ball. & B. 312.

(*e*) *Wms. on Assets*, 181.

(*f*) 17 & 18 Vict., c. 113.

(*g*) *Dacre v. Patrickson*, 1 Dr. & Sm. 186.

It is proposed briefly to consider—

I. The law applicable to cases not within the statute.

II. The effect and construction of the statute.

I. The law applicable to cases not within the statute.

(a.) Personalty primarily liable, unless mortgaged estate devised *cum onere*, or personalty exonerated.

(a.) The heir and also the devisee were *prima facie* entitled to have the descended and devised realty exonerated from the mortgage debt, and to have that debt paid out of the personal estate. If, therefore, the debt had been contracted by the deceased person himself, the personalty was the primary fund for its payment, the reason being that the personal estate was swelled by the mortgage money at the expense of the realty, just as much as the realty is now to be swelled at the expense of the personalty. What went into the deceased's personal pocket should also come out of same. Of course, however, even under the old law, the mortgaged estate might have been devised *cum onere*, or the personal estate might have been exempted by express words, or by necessary implication (*h*), in either of which cases the mortgaged lands would have borne the burden of the mortgage debt.

(b.) Mortgaged estate is primary fund, when mortgage is an ancestral debt.

(b.) If the mortgage debt was not the personal debt of the deceased deviser or ancestor, but the debt of a previous owner of the mortgaged estate, in other words, if the mortgage debt was an ancestral mortgage, the mortgaged estate was the primary, and the personalty was only the collateral, fund for its payment; consequently the devisee or heir-at-law, as the case might be, would, as a general rule, take the devised or descended estate with the burden of the ancestral mortgage on it, and would not be entitled to call upon the personal estate for exoneration. But if the ancestor or

Unless it be adopted as a personal debt.

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(h) *Davis v. Bush*, 4 Bligh, N. S. 305; *Townsend v. Mostyn*, 26 Beav. 72, 76; *Newhouse v. Smith*, 2 Sm. & Giff. 344.

devisor had adopted the debt as his own personal debt, the ordinary rule applied (*i*), and the mortgaged estate was in that case entitled to complete exoneration at the expense of the personal estate.

As to what acts did or did not amount to an adoption of the mortgage debt by the owner of the estate, so as to make the personalty primarily liable to discharge it, the reader is referred to the cases cited below (*j*). ♣

## II. The effect and construction of the statute.

(*a*.) It seems that copyholds as well as freeholds are within its provisions; but it was thought doubtful whether leaseholds were so, for the words of the Act are, "The heir or devisee to whom such lands or hereditaments shall *descend or be devised*" (*k*)—and these words were inapplicable to leasehold hereditaments. Eventually it was decided that the Act did not apply to leasehold hereditaments (*l*), and accordingly an amending Act (*m*) has been passed for the purpose of bringing leaseholds within it. The amending Act applies to any testator or intestate dying after the 31st December 1877 seised or possessed of or entitled to any *lands or other hereditaments, of whatever tenure*, which shall at the time of his death be charged with any mortgage or equitable charge, or with any lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum discharged out of any other estate of the testator or intestate unless,

Copyholds and freeholds are within the statute; *quære* as to leaseholds.

Leaseholds are included in amending Act, 1877.

(*i*) *Scott v. Beecher*, 5 Mad. 96.

(*j*) *Evelyn v. Evelyn*, 2 P. Wms. 659; *Hedges v. Hedges*, 5 De G. & Sm. 330; *Bagot v. Bagot*, 13 W. R. 169; *Swainson v. Swainson*, 6 De G. M. & G. 648; *Bond v. England*, 2 K. & J. 44; *Loosemore v. Knapman*, Kay, 123.

(*k*) *Piper v. Piper*, 1 J. & H. 91.

(*l*) *Solomon v. Solomon*, 33 L. J. Ch. 473; *In re Wormsley's Estate*, *Hill v. Wormsley*, L. R. 4 Ch. Div. 665.

(*m*) 40 & 41 Vict., c. 34.

in the case of a testator, he shall have signified a contrary intention.

Act refers only to specified charges.

(b.) The words "sums by way of mortgage," occurring in the principal Act, have been held to apply only to a defined or specified charge on a specified estate (n). The principal Act was held to be applicable also to an equitable mortgage of freeholds by deposit of title-deeds and memorandum (o). But it was held that the Act did not apply to a vendor's lien for unpaid purchase-money (p), consequently an amending Act, 30 & 31 Vict., c. 69, s. 2, was passed, whereby it is enacted that the word "mortgage" in the principal Act shall be deemed to extend to any lien for unpaid purchase-money on any lands or hereditaments purchased by a testator. The case of a purchaser who dies *intestate* (by what appears to be a curious oversight) is not, *quoad* this matter of lien, within the amending Act (q); but under the further Amendment Act of 1877, partly stated above, this omission is provided for.

Vendor's lien under 30 & 31 Vict., c. 69, and under 40 & 41 Vict., c. 34.

Rateable incidence of mortgage, in case of mixed security.

Under the operation of Locke King's Act, and the two several Acts amending same, as above stated, where a mortgage is made of a mixed fund of real and personal property, the incidence of the liability is upon both the real and the personal property equally, and is *pro rata*, neither being exempt in favour of the other (r).

"Contrary or other intention" in principal Act,—not what Campbell, L. C., thought.

(c.) What is a "contrary or other intention" within the meaning of the principal Act? The cases on this subject have been somewhat conflicting; but the cur-

(n) *Hepworth v. Hill*, 30 Beav. 476.

(o) *Pembroke v. Friend*, 1 J. & H. 132.

(p) *Hood v. Hood*, 5 W. R. 747; *Barnwell v. Iremonger*, 1 Dr. & Sm. 255, 260.

(q) *Harding v. Harding*, L. R. 13 Eq. 493.

(r) *Trestrail v. Mason*, 7 Ch. Div. 655; and see *Leonino v. Leonino*, 10 Ch. Div. 460; *Early v. Early*, W. N. 1878, p. 204; *Athill v. Athill*, 16 Ch. Div. 211; *Elliott v. Dearley*, 16 Ch. Div. 322.

rent of authority seems to be *against* the rule laid down by Lord Campbell in *Woolstencroft v. Woolstencroft* (s) as follows:—"I think the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, as was before observed with respect to exempting the personal estate, the mortgaged land being now primarily liable,"—that is to say, there must be both a discharge of the real estate and a charge of the personal estate.

However, in *Eno v. Tatham* (t), Turner, L.J., said, "The appellant's counsel has relied on the dictum of Lord Campbell in *Woolstencroft v. Woolstencroft*, that the rule which had been before observed with respect to exempting personal estate should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money. This probably meant no more than that the intention should be clearly proved. If Lord Campbell intended to say that as before the Act it had been necessary to show an intention not only to charge the mortgaged estate, but also to discharge the personalty, so now it is necessary to show an intention not only that another fund should be charged, but also that the mortgaged estate should be discharged, he (the Lord Justice) was not prepared to follow him. In order to take a case out of the Act, it was sufficient to show a contrary or other intention; this destroyed the analogy between the two cases. In the one case, the intention to be proved was contrary to a settled rule of the common law (meaning thereby the principles of equity apart from statute); in the other case, it was contrary only to a statutory rule expressly made dependent upon intention. . . . His opinion coincided with those cases in which it had been held that the mortgaged estates were not liable where there was a direction that the debt should be paid out of some other fund."

The true rule in *Eno v. Tatham*,—it is sufficient to charge the personal, without at the same time discharging the real estate.

(s) 2 De G. F. & Jo. 347.

(t) 11 W. R. 475; and see *Gall v. Fenwick*, 43 L. J. Ch. 179.

But not a mere general direction for payments of debts.

It had been decided that a mere general direction by the testator that the debts "shall be paid as soon as may be" (u), or that debts should be paid by "his executors out of his estate" (v), the source from which payment was to be made not being mentioned, would not have shown a contrary or other intention sufficient to exonerate the mortgaged estate from its primary liability; but that where the *personal* estate was bequeathed on trust to pay (w), or subject to the payment of, debts (x), these words were sufficient to show a contrary intention within the meaning of the Act so as to charge the personalty primarily with the payment of the mortgaged debts on estates devised by the will; however, now by 30 & 31 Vict., c. 69, an Act to explain the Act of 17 & 18 Vict., c. 113, in the construction of the will of any person who may die after the 31st day of December 1867, a general direction that the debts or all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the last-mentioned Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate (y).

Under 30 & 31 Vict., c. 69, the intention to charge the personalty with the mortgage-debts must be expressed or necessarily implied.

2. Lands expressly devised for payment of debts, equitable assets.

2. Lands devised to pay debts, and not merely devised charged with debts, are liable next after the personalty (z). These are equitable assets, and are

(u) *Pembroke v. Friend*, 1 J. & H. 132; *Coot v. Lowndes*, L. R. 10 Eq. 376.

(v) *Woolstencroft v. Woolstencroft*, 2 De G. F. & Jo. 347.

(w) *Moore v. Moore*, 1 De G. Jo. & Sm. 602.

(x) *Mellish v. Vallins*, 2 J. & H. 194.

(y) *In re Newmarch, Newmarch v. Storr*, 9 Ch. Div. 12; *In re Rossiter, Rossiter v. Rossiter*, 13 Ch. Div. 355.

(z) *Harmood v. Oglander*, 8 Ves. 125; *Phillips v. Parry*, 22 Beav. 279.

therefore applicable in payment of debts by specialty and by simple contract *pari passu*.

3. Real estates which have descended to the heir, but not charged with debts, are next liable (a). These are legal assets liable to debts by specialty binding the heir, but not before 47 Geo. III., c. 74, and 3 & 4 Will. IV., c. 104, to debts by other specialty or by simple contract.

3. Realty descended, legal assets.

4. Real estates devised specifically or by way of residue, and being at the same time charged with the payment of debts, are next liable, and, of course, *pro rata* (b). These are equitable assets, and debts are payable out of them *pari passu*. Also, if the heir takes, by reason of a lapse or other failure, land devised charged with debts, the land so charged is applicable for payment of debts in the same order as devised estates, and not till after the real estates which had descended (c), that is to say, it remains where it would have stood if it had not failed but taken effect, i.e., in the fourth (and not in the third) line in the order of liability. Also, since the Act for the amendment of the law of inheritance (d), when land is devised to the heir, he takes not as heir but as purchaser, and as such is placed in the same position in all respects as any other devisee of lands (e), that is to say, in the sixth (and not in the third) line in the order of liability stated on p. 265, *supra*.

4. Realty devised charged with debts, equitable assets.

Heir taking a lapsed devise.

Devise to heir makes him a purchaser.

After the passing of the Wills Act, the question

(a) *Davies v. Topp*, 1 Bro. C. C. 527; *Manning v. Spooner*, 3 Ves. 17; *Milnes v. Slater*, 8 Ves. 304; *Wood v. Ordish*, 3 Sm. & Giff. 125.

(b) *Barnewell v. Lord Cawdor*, 3 Mad. 453; *Irvin v. Ironmonger*, 2 Russ. & My. 531.

(c) *Wood v. Ordish*, 3 Sm. & Giff. 125; *Stead v. Hardaker*, L. R. 15 Eq. 175. And see (as to lapsed personal estate) *Trethewy v. Helyar*, L. R. 4 Ch. Div. 53; *Fenton v. Wills*, L. R. 7 Ch. Div. 33. See also *In re Jones*, *Jones v. Caless*, 10 Ch. Div. 40.

(d) 3 & 4 Will. IV., c. 106.

(e) *Biederman v. Seymour*, 3 Beav. 368; *Strickland v. Strickland*, 10 Sim. 374..



A residuary devise is specific.

arose whether a residuary devise was still to be deemed specific, at least for the purposes of settling the order of liability in the administration of the assets of a deceased person. This question was answered in the affirmative in the case of *Hensman v. Fryer* (f), decided on appeal by Lord Chelmsford; and as Lord Chelmsford's decision upon this point has been since (after much professional and judicial conflict of opinion regarding it) approved and confirmed by Lord Cairns in the recent case of *Lancefield v. Iggulden* (g), the specific character of the residuary devise is now concluded by authority.

5. General pecuniary legacies.

5. General pecuniary legacies are next liable, and of course *pro rata* (h).

6. Specific legacies and devises *pro rata*.

6. Specific legacies (i) and real estates devised specifically or by way of residue, and not being at the same time charged with the payment of debts (j), are next liable, and of course *pro rata*, to contribute to the payment of debts by specialty, in which the heirs are bound (k), and also (it is conceived) to the payment of debts by simple contract and by specialty, in which the heirs are not bound (l).

*Hensman v. Fryer*,—explained.

In the above-mentioned case of *Hensman v. Fryer*, Lord Chelmsford, after deciding that a residuary devise was still specific, further held (but apparently only to do particular justice in the particular circumstances of that case), that pecuniary legatees were entitled to call

(f) L. R. 3 Ch. App. 420; *Gibbons v. Eyden*, L. R. 7 Eq. 371; 2 Jarm. on Wills, 589; but see *Lancefield v. Iggulden*, L. R. 10 Ch. App. 136.

(g) L. R. 10 Ch. App. 136.

(h) *Clifton v. Burt*, 1 P. W. 680; *Headley v. Readhead*, Coop. 50.

(i) *Fielding v. Preston*, 1 De G. & Jo. 438; *Evans v. Wyatt*, 31 Beav. 217.

(j) *Mirchouse v. Scatfe*, 2 My. & Cr. 695; *Milnes v. Slater*, 8 Ves. 303.

(k) *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 655.

(l) *Collis v. Robins*, 1 De G. & Sm. 131.

on residuary devisees to contribute rateably to the payment of debts which the general personal estate was insufficient to satisfy. But this part of that decision which appeared to overrule a long series of authorities, decided as well by courts of appeal as by courts of first instance (*m*), is not to be considered as laying down any general rule upon the subject (*n*); on the contrary, in *Lancefield v. Iggulden*, *supra*, Lord Cairns applied the general rule, and ranked (as it was only consistent to rank) residuary devisees among specific devisees for all the purposes of administration, that is to say, in the fourth line of liability if charged with the payment of debts, and in the sixth line of liability if not so charged, keeping company in each case with lands specifically devised.

7. Real or personal property over which the testator has a *general* power of appointment, if and so far as he has *actually* exercised that power (*o*), whether by deed *in favour of volunteers* or by will, is next applicable. In this case the property appointed will in equity form part of the appointor's assets, so as to be subject to the demands of his creditors in preference to the claims of his legatees or appointees (*p*).

7. Property over which testator has exercised a general power of appointment.

8. The paraphernalia of the testator's widow occupies the last line in the order of liability, she being preferred to all legatees and devisees, and ranking, in fact, in the order of preference, next after the creditors of the deceased, and that for the reason that her paraphernalia,

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(*m*) 2 W. & T. 98; *Cifton v. Burt*, 1 P. Wms. 678; *Fielding v. Preston*, 1 De G. & Jo. 438.

(*n*) *Collins v. Lewis*, L. R. 8 Eq. 708; *Dugdale v. Dugdale*, L. R. 14 Eq. 235; and see *Tomkins v. Colthurst*, L. R. 1 Ch. Div. 626; *Farquharson v. Floyer*, L. R. 3 Ch. Div. 109.

(*o*) *Fleming v. Buchanan*, 3 De G. M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. & Giff. 305; *Pardo v. Bingham*, L. R. 6 Eq. 485.

(*p*) *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206; *Vaughan v. Vanderstegen*, 2 Drew. 165; *In re Van Hagen*, *Spurling v. Rochfort*, 16 Ch. Div. 18.

although liable to her husband's debts, cannot be disposed away from her by his will alone.

Retainer by  
executor,—its  
origin, and  
limits.

In the application of the testator's assets to or towards the payment of his debts in the order above expounded and exemplified, the testator's intention, expressed or presumed, is supposed to be the guide (*g*). As regards the singularity next mentioned, viz., the executor's retainer, it is uncertain whether that application of the assets depends upon the mere implication of law,—the implication of equity being against it,—or upon some question of presumed intention. The right of retainer is said to have arisen from the executor's inability to sue himself (*scil.* in a court of law) for the recovery of his own debt (*r*). The right of retaining his own debt which belongs to an executor, and which is called the executor's retainer, is a right which exists in the case of legal assets only, and not also in the case of equitable assets; moreover, it is a right only *inter pares*, i.e., as against creditors in an equal degree with the executor; and if, therefore, he is a simple contract creditor, he cannot retain as against specialty creditors (*r*). But the executor's right, when it exists, is not lost by a decree in an administration action (*s*), nor by payment of the fund into court (*t*); and it exists although the debt is a joint debt (*u*). Nevertheless the executor cannot retain out of moneys which he holds as a trustee only for the estate of the testator (*v*), and he may otherwise be deprived of the full benefit of it, e.g., where he has assented to a composition (*w*).

8 Ad Chap 104, 226 b 1427-200 10 11 11

(*g*) Williams' Real Assets, 108; *Talbot v. Frere*, 9 Ch. Div. 568.

(*r*) *Walters v. Walters*, 18 Ch. Div. 182.

(*s*) *Campbell v. Campbell*, 16 Ch. Div. 198.

(*t*) *Richmond v. White*, 10 Ch. Div. 727, reversed on appeal 12, Ch. Div. 361.

(*u*) *Crowder v. Steuart*, 16 Ch. Div. 368.

(*v*) *Talbot v. Frere*, 9 Ch. Div. 568.

(*w*) *Beswick v. Orpen*, 16 Ch. Div. 202.

## CHAPTER XV.

## MARSHALLING ASSETS.

It must not be forgotten that the order (stated and expounded in the preceding chapter) in which the several funds liable to the payment of debts are to be applied, regulates the administration of the assets *only as between or among the testator's own representatives, devisees, and legatees*, and does not affect the right of the creditors themselves to resort, in the first instance, to all or any of the funds to which their claims extend. It might have happened, therefore, in times preceding the Act 3 & 4 Will. IV., c. 104, although it can hardly (if at all) happen now, that a creditor having a right to proceed against two or more funds proceeded against some fund which was the only resource of some other creditor, less amply provided for than himself. Equity would in such a case have held that the creditor having two funds should not, by resorting to the fund which was the only resource of another creditor, disappoint that other; but would have permitted the latter to stand, to the extent of his disappointment, in the place of the more favoured creditor, against the other fund, to which the less favoured creditor had no direct access, the object of the court in so doing being, that all creditors should be satisfied, so far as, by any arrangement consistent with the nature of their several claims, the property which they ought to affect could be applied in satisfaction of such claims (a).

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(a) *Aldrich v. Cooper*, 2 L. C. 80; and see *Ex parte Ward*, in re *Ward*, 20 Ch. Div. 356.

The general principle of marshalling explained.

Two varieties of marshalling. It is proposed to examine the cases in which equity carries out this or an analogous principle—and here—under :—

Firstly, Marshalling as between creditors; and,

Secondly, Marshalling as between the beneficiaries entitled under the will.

1. As between creditors. Under old law, simple contract creditors permitted to stand in shoes of specialty creditors as against the reality.

Firstly, under the old law, before 3 & 4 Will. IV., c. 104, simple contract creditors had, as we have seen, no claim upon the real assets of a deceased person, unless these assets were charged with, or were devised for the payment of, debts. In the absence of such charge or devise, specialty creditors, who might in the first instance resort to the personal estate, in priority to simple contract creditors, and also to the real assets, in exclusion of simple contract creditors, would be compelled in equity to resort for the satisfaction of their debts, in the first place, to the real assets, as far as they went, so as to leave the personalty for the simple contract creditors; or if the specialty creditors had already exhausted the personal assets in payment of their claims, the simple contract creditors would be put to stand in their place against the real assets, whether devised or descended, *as far as the specialty creditors might have exhausted the personal assets.*

Marshalling against a mortgagee who exhausts or diminishes the personalty.

In *Aldrich v. Cooper* (b), decided before 3 & 4 Will. IV., c. 104, a mortgagee of freehold and copyhold estates, who was also a specialty creditor, having exhausted the personal assets, simple contract creditors were held entitled to stand in his place against both the freehold and the copyhold estates, *so far as the personal estate was taken away from them by such specialty creditor.* And in *Selby v. Selby* (c), it was decided that

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(b) 2 L. C. 80.

(c) 4 Russ. 336.

if the vendor of an estate, the contract for which was not completed in the lifetime of the testator who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, *to the extent of his lien on the estate sold*, as against the devisee of that estate.

Also, against an unpaid vendor, who does the like.

Freehold and copyhold estates being now, under 3 & 4 Will. IV., c. 104, liable to simple contract debts, the court is no longer under any such necessity of resorting to the doctrine of marshalling to enforce their payment (d). And the recent statute 32 & 33 Vict., c. 46, having abolished the priority of specialty over simple contract debts in the administration of the estates of all persons dying after the 1st of January 1870, questions of marshalling *as between creditors* have now become of little practical importance (e),—and of yet less importance in the case of persons dying insolvent on or after the 1st November 1875, as stated in the preceding chapter.

Realty now assets for payment of all debts, 3 & 4 Will. IV., c. 104.

Priority of creditors abolished, 32 & 33 Vict., c. 46, and 38 & 39 Vict., c. 77, s. 10.

Marshalling would not, unless founded on some equity, have been enforced as between persons, unless they were creditors of the same debtor, and had demands against funds the property of the same debtor. "It was never said," observed Lord Eldon, "that if I have a demand against A. and B., a creditor of B. shall compel me to go against A., without more; . . . but If I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity, giving B. the right for his own sake to seek payment from A." (f). *It is well understood for A.*

No marshalling except between creditors of the same person.

(d) *Craddock v. Piper*, 15 Sim. 301; *Gwynne v. Edwards*, 2 Russ. 289 n.

(e) See also 36 & 37 Vict., c. 66, s. 25, *supra*.

(f) *Ex parte Kendall*, 17 Ves. 520.

Marshalling of securities,—  
general rules  
regarding.

The court has applied the like principles to the marshalling of securities; but this subject is one of so difficult a character, and depends upon distinctions so minute, that it is hardly possible to express the law regarding it in anything like a brief and intelligible way. The following is an attempt to express the more salient points of the law:—

The general principle may be thus stated, adopting with some slight adaptation the words of Lord Hardwicke in *Lanoy v. Duke of Athole* (g), viz.:—If a person having two real estates, mortgages both estates to A., and afterwards mortgages one only of the estates to B., whether or not B. had notice of A.'s mortgage (h), the court directs A. (but always without prejudice to A.) to realise his debt out of that estate which is *not* in mortgage to B., so as to leave the one estate which is in mortgage to B. to satisfy B. so far as it goes.

This general principle of marshalling is applicable also as against a surety, to whom (on payment by him of the debt) A. may have assigned his two securities (i).

The principle is subject to the following restriction, viz., that the marshalling of securities is not enforceable by B. to the prejudice of C. (a third person) (j). The subject is fully discussed in the chapter on Mortgages, and in the chapter on Suretyship, *infra*.

Secondly, It remains to consider the doctrine of

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(g) 2 Atk. 446.

(h) *Tidd v. Lister*, 10 Hare, 157.

(i) *South v. Blozam*, 2 Hem. & Mill. 457; *Robinson v. Gee*, 1 Ves. Sr. 252.

(j) *Averall v. Wade*, L. & G. t. Sugd. 252; *Barnes v. Racster*, 1 Yo. & Col. Ch. Ca. 401; *Thornycroft v. Crockett*, 2 H. L. Cas. 239; and see *Forbes v. Jackson*, 19 Ch. Div. 615.

marshalling as between the divers beneficiaries entitled under the will, and (in the case of partial intestacies) as between also the heir-at-law and the next of kin. In this group of cases it is usually by reason of the disturbing action of the creditors of the deceased that the question of marshalling arises, although occasionally (as will be shown later on in this present chapter) it may arise from other causes. Now, where it arises from the disturbing action of creditors,—the general principle which runs through all the cases of marshalling as between beneficiaries may be arrived at in this way, viz.,—Taking the various properties specified on p. 265, *supra*, in the order of their respective liabilities to the payment of debts in the administration of assets as shown on that page, and substituting in the same order the various persons to whom these various properties would go if there were no debts to pay, and to whom they do, in fact, go, so far as they are not exhausted by the payment of debts, we obtain the following list of the persons entitled under the will (and otherwise) to participate in the property of the deceased testator, that is to say,—

1. The next of kin or the residuary legatees ;
2. The heir-at-law ;
3. The heir-at-law ;
4. The charged devisees (specific and residuary) ;
5. The pecuniary legatees ; ( *general + residuary* )
6. The devisees (specific and residuary) and the specific legatees ; — *specific + residuary*
7. The general appointees by deed or will ; and,
8. The widow.

Now, the general rule of marshalling is derived from the preceding list of beneficiaries in this way, and is to this effect, viz. :—

That if any beneficiary in the above list is dis-

2. As between the beneficiaries entitled under the will.

pp 255  
The general principle of marshalling,—how derived from the order of the liability of the divers properties.



appointed of his benefit under the will through the creditor seizing upon (as he may) the fund intended for such disappointed person, then such person may recoup or compensate himself for that disappointment (to the extent thereof) by going against the fund or funds intended for (and in that way similarly disappointing in his turn) any one or more of the beneficiaries prior to himself in the above list; and such secondly disappointed person or persons may in his or their turn do the like against those prior to him or them, so that eventually the next of kin or residuary legatees (as the case may be) have to bear the disappointment without any means of redress; but nobody may go against any one posterior to himself on the list; and persons occupying the same rank in the list may have contribution (if not compensation) as against each other.

The general principle,—  
application of.

We proceed to test this rule in its application to the decisions.

Widow's paraphernalia preferred to a general legacy.

Although, with the exception of necessary wearing apparel (*k*), a widow's paraphernalia are liable to her deceased husband's debts, she will be preferred to a general legatee, and be entitled therefore to marshal assets in all cases in which a general legatee would be entitled to do so (*l*). And on principle it would seem to be settled also that a widow, as to her paraphernalia, is to be deemed entitled to precedence also over specific legatees and devisees (*m*). In fact, both principle and the weight of authority point to the conclusion that a widow, as to her paraphernalia, is entitled to rank next after the ordinary creditors (*n*).

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(*k*) *Lord Townshend v. Windham*, 2 Ves. Sr. 7.

(*l*) *Tipping v. Tipping*, 1 P. W. 730; *Boynston v. Parkhurst*, 1 Bro. C. C. 576.

(*m*) *Lord Townshend v. Windham*, 2 Ves. Sr. 7; *Probert v. Clifford*, Amb. 6; *Graham v. Londonderry*, 3 Atk. 395.

(*n*) *Wms. Real Assets*, 118.

If the heir-at-law has paid any debts which ought to have been paid, first, out of the general personal estate, secondly, out of lands subject to a trust or power for their payment, he will have a right to have the assets marshalled in his favour as against those two funds, but not to the prejudice of pecuniary legatees, still less to the disappointment of specific gifts; for the heir is not a devisee, while the general or specific legatees take by the special bounty of the testator (o).

Right of heir as to descended land.

A devisee of lands charged with the payment of debts paying any debts whilst any of the previously liable property remains unexhausted, will have a right to have the assets marshalled in his favour, and to stand in the place of the creditor so far as regards, first, the general personal estate; second, land subject to a trust or power for raising the debts; and, third, lands descended to the heir (p).

Devisee of lands charged with debts.

Since the decision of Lord Chelmsford in *Hensman v. Fryer* (q), as affirmed and applied in *Lancesfield v. Iggulden* (r), residuary devisees stand in the same position as specific legatees or devisees.

Position of a residuary devisee.

Pecuniary legatees, if the personal estate out of which they are to be paid has been exhausted by creditors, are entitled to be paid—

Against whom pecuniary legatees may marshal.

(a.) Out of lands which descend to the heir (s).

(b.) Out of lands devised simply subject to debts (t).

(o) *Hanby v. Roberts*, Amb. 128.

(p) *Harmood v. Oglander*, 8 Ves. 106.

(q) L. R. 3 Ch. App. 420; *Gibbins v. Eyden*, L. R. 7 Eq. 371.

(r) L. R. 10 Ch. App. 136; and see *Tombkins v. Colthurst*, L. R. 1 Ch. Div. 626; *Farquharson v. Floyer*, L. R. 3 Ch. Div. 109.

(s) *Sproule v. Prior*, 8 Sim. 189.

(t) *Rickard v. Barrett*, 3 K. & J. 289.

(c.) Out of lands subject to a mortgage, to the extent to which the mortgagee may have disappointed them by resorting first to the personal estate (u).

But pecuniary legatees have no right to marshal against lands comprised in a residuary devise any more than against specific legatees and devisees (v), unless such residuary devise should be charged with the payment of debts.

Specific legatees and devisees.

In this view of the law, specific legatees and devisees (including residuary devisees) have the right, if called on to pay any debts of their testator, to have the whole of his other property, real or personal, marshalled in their favour, so as to throw the debts as far as possible on the other assets, which are antecedently liable.

Contribute ratably, *inter se*.

A specific devisee (including a residuary devisee) and a specific legatee contribute *pro rata* to satisfy the debts of the testator, which the property antecedently liable has failed to satisfy, for the testator's intention of bounty is equal in all these cases (w).

If specific devisee or legatee take subject to a burden, he cannot compel the others of the same class to contribute.

If, however, the subject of any specific devise (including a residuary devise) or specific bequest is liable to any particular burden of its own, the devisee or legatee must bear it alone, and cannot call the other specific legatees or the other devisees to his aid. Thus, the devisee of land bought by the testator but not paid

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(u) *Johnson v. Child*, 4 Hare, 87; and see *Lutkins v. Leigh*, Cas. t. Talb. 53 (where the creditors were mortgagees), and *Lord Lilford v. Ponys-Kock*, L. R. 1 Eq. 347 (where the creditors were unpaid vendors); and compare *Wythe v. Henniker*, 2 My. & K. 635.

(v) *Lancefield v. Iggulden*, L. R. 10 Ch. App. 136, showing the true general application of the decision in *Hensman v. Fryer*, L. R. 3 Ch. App. 420.

(w) *Tombs v. Rock*, 2 Coll. 490, as explained in *Lancefield v. Iggulden supra*.

for, cannot call on the other devisees or on the specific legatees to pay a proportion of the purchase-money to which his land is subject by reason of the vendor's lien, although prior to 30 & 31 Vict., c. 69, he might have claimed to have his land exonerated at the expense of every one else taking property antecedently liable (x).

There is yet another case in which equity, out of regard to the testator's intention, marshals assets in favour of legatees. This case, however, does not depend on the same principle as those we have already mentioned; it does not arise in consequence of the disturbing action of any creditor who has taken some part of the assets out of their usual order, but simply from the presumption that when a testator leaves legacies, he wishes that if possible they should all be paid. To understand this branch of the subject, the reader must bear in mind that *even to the present day legacies are not payable out of real estate UNLESS the testator has charged his real estate with their payment* (y), there never having been any statute passed to do for legacies what the statute 3 & 4 Will. IV., c. 104, has done for simple contract debts. If, therefore, a testator should leave certain legacies payable only out of his personal estate, and certain others which he has charged on his real estate, in aid of his personalty, and the personalty should not be sufficient to pay the whole, equity will marshal these legacies, so as to throw those charged on the real estate entirely on that estate, in order to leave more of the personalty applicable to the payment of the other legacies (z).

(x) *Emuss v. Smith*, 2 De G. & Sm. 722; and see also the cases cited on p. 269, footnote (j).

(y) As to what amounts to an implied charge of legacies upon land, see *Greville v. Browne*, 7 H. L. Ca. 789; and for the extent of such implied charge, see *Gainsford v. Dunn*, L. R. 17 Eq. 405. See also *Bray v. Stevens*, 10 Ch. Div. 162; *Bailey v. Bailey*, 12 Ch. Div. 268.

(z) *Bonner v. Bonner*, 13 Ves. 379; *Scales v. Collins*, 9 Hare, 656; *Wms. Real Assets*, 115.

Where a legacy charged on real estate fails, it will not be treated as if it were not so charged, so as to be made transmissible.

X

But where the charge of a legacy upon real estate fails to affect it, in consequence of an event happening subsequently to the death of the testator, as the death of the legatee before the time of payment, the court will not marshal assets so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible, whereas, as against the real estate, it would most probably sink by the death of the legatee (a).

Assets not marshalled in favour of charities.

Assets are never marshalled in favour of legacies given to charities, upon the ground that a court of equity is not warranted in setting up a rule of equity contrary to the common rules of the court merely to support a bequest which is contrary to law. If, therefore, a testator should bequeath to a charity a legacy payable out of the produce of his real and personal estate (b), or a simple legacy without expressly charging it on that part of his personal estate which he may lawfully bequeath to charitable uses, the legacy will fail by law in the proportion which the real estate and personalty in the one case, or such personalty in the other, may bear to the whole fund out of which the legacy was made payable (c); or, as Lord Cottenham has expressed himself in *Williams v. Kershaw* (d), "The rule of the court adopted in all such cases is, to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as would in that way be to be paid out of the prohibited fund." But when it is said that the court will not marshal legacies in favour of charities, it is meant that the

(a) *Prowse v. Abingdon*, 1 Atk. 482; *Pearce v. Loman*, 3 Ves. 135. But see *Henty v. Wrey*, 19 Ch. Div. 492; as to legacies charged on land not now sinking in such a case.

(b) *Currie v. Pye*, 17 Ves. 462.

(c) *Robinson v. Geldard*, 3 Mac. & G. 735; *Fourdrin v. Gowdey*, 3 My. & K. 397; *Johnson v. Lord Harrowby*, Johns. 425; *Hobson v. Blackburn*, 1 Keen, 273.

(d) 1 Keen, 275 n.; and see *Blann v. Bell*, 7 Ch. Div. 382.

court will not do so when the will is silent; because if (as is usually the case) the will expressly directs that the legacies shall be marshalled in favour of the charities, then the court is ready to carry out that direction, and it does so with a liberal hand (e).

(c) *Miles v. Harrison*, L. R. 9 Ch. App. 316; *Att.-Gen. v. Lord Mountmorris*, 1 Dick. 379; *Luckraft v. Pridham*, W. N. 1879, p. 94.

## CHAPTER XVI.

## MORTGAGES.

Definition of mortgage.

Mortgage at common law.

An estate upon a condition.

Forfeiture at law on condition broken.

A LEGAL mortgage may be defined to be a debt secured on lands or other property, the property not being (like pew-rents) unmortgageable (a); the legal ownership is vested in the creditor, but in equity the debtor remains the actual owner. It is necessary, first, to show what is the effect of a mortgage at common law, and then to show how equity has modified or altered the common law to suit the ends of practical justice.

At law, the ordinary mortgage, or *mortuum vadium*, as it was called, was strictly an estate upon condition; that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment, or in a deed of defeasance executed at the same time, by which it was provided that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition. If the condition was performed, the feoffor re-entered and was in possession of his old estate. If the condition was broken, the feoffee's estate became absolute and indefeasible, and all the legal consequences followed, as though he had been absolute unconditional owner from the time of the feoffment (b).

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(a) *Ex parte Arrowsmith, in re Leveson*, 8 Ch. Div. 96.

(b) *Coots*, 6.

Happily, a jurisdiction arose under which the harshness of the common law was softened without any actual interference with its principles, and a system was established at once consistent with the security of the creditor and with a due regard for the interests of the debtor (c). Our courts of equity, borrowing the doctrines of the civil law, did not indeed attempt to alter the legal effect of the forfeiture at common law; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he should retain as owner for his own benefit what was intended as a mere security, and they adjudged that a breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagor had "an equity to redeem," on payment within reasonable time, of principal, interest, and costs, notwithstanding the forfeiture at law. Against the introduction of this novelty the common law judges strenuously opposed themselves, and though ultimately defeated by the increasing power of equity, they, nevertheless, in their own courts, still adhered to the rigid doctrine of forfeiture, and in the result the law of mortgage fell almost entirely within the jurisdiction of equity (d).

Interference of equity.

Equity operated on the conscience of the mortgagee. Mortgage held as mere pledge.

Mortgagor's equity to redeem notwithstanding forfeiture at law.

No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion, and it was a bold but a necessary decision of equity that the maxim of law, *modus et conventio vincunt legem*, was inapplicable—that the debtor could not, even by the most solemn engagements entered into *at the time of the loan*, preclude himself from his right to redeem. The courts, looking always at the intent rather than at the form of things, disregarded all the defences by which the creditor sur-

Mortgages an exception to the maxim, *modus et conventio vincunt legem*.

Debtor cannot at time of loan part with his right to redeem.

(c) Coote, 9.

(d) Coote, 10.



"Once a mortgage always a mortgage."

rounded himself, and laid down as a plain and invariable rule (e), that it was inequitable that the creditor should obtain a collateral or additional advantage through the necessities of his debtor, beyond the payment of principal, interest, and costs (f), and they established as a principle not to be departed from, that "once a mortgage always a mortgage;" that an estate could not at one time be a mortgage and at another time cease to be so *by one and the same deed*; and that whatever clause or covenant there might be in a conveyance, yet, if upon the whole it appeared to have been the intention of the parties that such conveyance should only be a mortgage, or should only pass an estate redeemable, a court of equity would always construe it so (g).

Right of pre-emption in mortgagee.

These rules, however, did not prevent a mortgagee agreeing with the mortgagor for a preference or right of pre-emption in case of a sale (h); and any other agreements between mortgagor and mortgagee (provided they did not exclude the equity of redemption) were and are good, *e.g.*, an agreement not to call in the principal moneys so long as the interest is paid (i). Also, the rule regarding mortgages must also be distinguished from the rule governing a class of cases where there is *ab initio* an absolute *bond fide* sale and conveyance with a collateral agreement for re-purchase by the mortgagor on payment of the purchase-money within a stipulated time (j); and such collateral agreement may be either introduced into the agreement for sale at the time, or may be made at a subsequent period. Whether a given transaction is a mortgage properly so

Conveyance with option of re-purchase in mortgagor.

Circumstances distinguishing a mortgage from a sale with right of re-purchase.

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(e) *Bonham v. Newcomb*, 2 Vent. 364; *Howard v. Harris*, 1 Vern. 19.  
 (f) *Chambers v. Goldwin*, 9 Ves. 254; *Leith v. Irvine*, 1 My. & K. 277; *Broad v. Selfe*, 11 W. R. 1036.  
 (g) *Coote*, 11; *Jennings v. Ward*, 2 Vern. 520.  
 (h) *Orby v. Trigg*, 9 Mod. 2; *Cookson v. Cookson*, 8 Sim. 529.  
 (i) *Keene v. Biscoe*, 8 Ch. Div. 201.  
 (j) *Alderson v. White*, 2 De G. & J. 97; *Birmingham Canal Co. v. Cartwright*, 11 Ch. Div. 421.

called, or is a sale with the option of re-purchase, depends on the special circumstances of each case; and parol evidence will always be admitted to show that what appears on the face of the deed to be an absolute conveyance was intended to be a conveyance by way of mortgage only (*k*); *e.g.*, if the money paid would be grossly inadequate as the price for the absolute purchase of the estate; or if he was not let into immediate possession of the estate; or if he accounted for the rents to the grantor, and only retained an amount equivalent to his interest (*l*). And the difference between a transaction by way of sale with a right of re-purchase and a mortgage is very important with reference to the consequences of each; for whereas in a mortgage, even after forfeiture at law, the mortgagor has his right of redemption in equity, yet in the case of a sale with a right of re-purchase, the time limited must be exactly observed, and there is no principle on which the court of equity can in the latter case relieve, if the time is not exactly observed (*m*). And there is also this further important difference, *viz.*, that in the case of a sale, with an option to re-purchase, if the purchaser die seised, and *then* the right to re-purchase is exercised, the money goes to his real representative, and not, as in case of a mortgagee, to his personal representatives (*n*).

Effects of this distinction.

In a sale with right of re-purchase, time is strictly to be observed.

In a sale with right of re-purchase, if purchaser die seised, money goes to real representative.

Besides these, there are several other species of securities for money which do not take the form of an ordinary mortgage. Thus,

Other forms of securities,—

1. The *vivum vadium*, in which the owner of an estate, in consideration of money lent, conveyed it to

1. *Vivum vadium*. Lender to pay himself from rents and

(*k*) *Maxwell v. Montacute*, Prec. Ch. 526; *Barnhart v. Greenshields*, 9 Moo. P. C. C. 18; *Douglas v. Calverwell*, 3 Giff. 251.

(*l*) Powell on Mortgages, by Coventry, 125 a.; *Brooke v. Garrod*, 3 K. & J. 608, 2 De G. & Jo. 62; *Williams v. Owen*, 5 My. & Cr. 303.

(*m*) *Barrell v. Sabine*, 1 Vern. 268.

(*n*) *Thornbrough v. Baker*, 2 L. C. 1046; *St. John v. Wareham*, cited 3 Swanst. 631. And see the case of *Drant v. Vanse*, 1 Y. & Co. C. C. 580.

the lender, with a condition that as soon as he, the lender, had repaid himself out of the rents and profits of the land the principal and interest of the loan, the debtor might re-enter. This was called a *vivum vadium*, because as the security itself worked off the debt, it might be deemed to possess a sort of vitality. It seems now to have entirely ceased (o).

2. *Mortuum vadium*.  
Creditor took  
rents and  
profits with-  
out account.

2. The *mortuum vadium*, which, according to Glanville (p), was a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which time he received the rents *without account*, so that the security in this case did not of itself work off the debt, but was in a manner *dead*. However, in this form of mortgage, as in the *vivum vadium*, the estate was never lost (q), but remained redeemable upon satisfaction of principal and interest at any time, however distant.

Estate never  
lost.

3. Welsh mort-  
gage.

3. The *Welsh mortgage*, which closely resembled the *mortuum vadium*, in that the rents and profits were received by the mortgagee as an equivalent for his interest, and the principal remained undiminished (r). In a Welsh mortgage there was no contract express or implied between the parties for the repayment of the debt at a given time; and though the mortgagee could not foreclose or sue for the money, the mortgagor or his heirs might redeem at any time (s).

Mortgagor  
may redeem at  
any time.

Modern mort-  
gage.

In the modern form of mortgage, when the mortgagee is in possession, he is strictly *accountable* in equity for the rents and profits, and by means thereof he in effect works off the debt, as in the *vivum vadium*; but differently from all these old forms of mortgage, the modern mortgage may from various causes (as we shall see) become irredeemable.

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(o) Coote, 4. (p) Lib. 10, c. 6. (q) Coote, 5. (r) Coote, 4.  
(s) *Howell v. Price*, Prec. Ch. 423, 477; and see 1 Ves. Sr. 405.

In early times, it was said that an equity of redemption was a mere *right*; but in *Casborne v. Scarfe* (t), Lord Hardwicke laid it down that this equity was an estate in the land; and it follows, therefore, that the person entitled to the equity of redemption, being considered in equity the real owner of the land, may exercise all acts of ownership over the incumbered land, subject only to the rights of the mortgagee; *e.g.*, the mortgagor may settle, or devise, or even again mortgage the land subject to the first mortgage (u). Also the mortgaged estate in the course of its descent is governed by the general law; and if the land be of gavelkind tenure, the equity of redemption will descend accordingly; or if the tenure be borough-English, the youngest son will be entitled (v).

The nature of an equity of redemption,—it is an estate in the land over which the mortgagor has full power, subject to the incumbrance.

Devolution of equity of redemption same as of the land.

The equity of redemption being an estate in land, all persons entitled to any estate or interest in that equity are entitled before foreclosure to come into a court of equity to redeem (w),—that is to say,—

Who may redeem.

- 1 (a.) The heir (x);
- ✓ (b.) The devisee (y);
- (c.) A tenant for life, a remainder-man, a reversioner, a dowress, a jointress, a tenant by the curtesy (z);
- 4 (d.) An assignee or grantee (*i.e.*, a purchaser) (a);
- 5 (e.) A subsequent mortgagee (b);
- 1 (f.) A judgment-creditor even (c);
- 7 (g.) The crown, or the lord on a forfeiture (d); and

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(t) 2 L. C. 1035; 1 Atk. 603.  
 (u) *Casborne v. Scarfe*, 1 Atk. 603.  
 (v) *Coots*, 26; *Fawcett v. Lowther*, 2 Ves. Sr. 301.  
 (w) 2 Sp. 660-663. (x) *Pym v. Bowreman*, 3 Swanst. 241 n.  
 (y) *Lewis v. Nangle*, 2 Ves. Sr. 431. (z) 2 L. C. 1078.  
 (a) *Anon.*, 3 Atk. 314. (b) *Fell v. Brown*, 2 Bro. C. C. 278.  
 (c) *Stonehewer v. Thompson*, 2 Atk. 440; *Beckett v. Buckley*, L. R. 17 Eq. 435; *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275; *Bryant v. Bull*, 10 Ch. Div. 153.  
 (d) *Lovel's case*, 1 Eden, 210; *Downe v. Morris*, 3 Hare, 394.

δ (*h.*) A volunteer, although claiming under a deed fraudulent and void under 27 Eliz, c. 4 (*e*).

Successive redemptions,—order of, and general principle regarding.

Every person who has a right to redeem the mortgage may redeem any prior incumbrancer on payment of principal, interest, and costs (*f*) due to him, and which aggregate amount is commonly called “the price of redemption;” the redeeming party being also liable to be redeemed by those below him, who are all liable successively to be redeemed by the mortgagor (*g*); and the rule or practice in a bill or action of foreclosure is to offer to redeem all incumbrancers prior in date to the plaintiff, and to claim to foreclose (if necessary) all incumbrancers posterior in date to the plaintiff, unless these latter, or some or one of them, should redeem the plaintiff (*h*). This rule is familiarly expressed in the phrase, “*Redeem up, foreclose down.*” The arrears of interest recoverable upon a redemption or foreclosure are usually six years only (*i*), but are occasionally the entire arrears (*j*). An auctioneer-mortgagee may be entitled to add to the price of redemption his commission, that not being a secret profit (*k*). Also, one of several co-mortgagees can sue the mortgagor for redemption, making the other mortgagees co-defendants when they refuse to be co-plaintiffs (*l*). And lastly, a mortgagor may avoid being foreclosed by compelling a transfer of the debt and security to some third person (*m*).

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(*e*) *Rand v. Cartwright*, 1 Ch. Ca. 59.

(*f*) *Ex parte Carr, in re Hofmann*, 11 Ch. Div. 62; *Sheffield v. Eden*, 10 Ch. Div. 291; and see also *Rees v. Metropolitan Board of Works*, 14 Ch. Div. 372; *In re Wade v. Thomas*, 17 Ch. Div. 348; *Ellon v. Curteis*, 19 Ch. Div. 49.

(*g*) 2 Sp. 665.

(*h*) *Beevor v. Luck*, L. R. 4 Eq. 537; *Bradley v. Riches*, 9 Ch. Div. 189.

(*i*) 3 & 4 Will. IV., c. 27, s. 42.

(*j*) *Smith v. Hill*, 9 Ch. Div. 143.

(*k*) *Miller v. Beal*, W. N. 1879, p. 36.

(*l*) *Luke v. South Kensington Hotel Co.*, 7 Ch. Div. 739; 11 Ch. Div. 121.

(*m*) *Teevan v. Smith*, 20 Ch. Div. 724; Conveyancing Act, 1881, s. 15.

A person cannot redeem before the time appointed in the mortgage deed, although he tenders to the mortgagee both the principal and the interest due up to that time (*n*); and if the mortgagee should, as a matter of indulgence, consent to accept payment before the time appointed, he is entitled to the full amount of interest up to that time. So, likewise, if after the day fixed for the payment of the money is passed, the mortgagor should wish to pay off the mortgage, he must give to the mortgagee six calendar months' previous notice in writing of his intention so to do, and must then punctually pay or tender the money at the expiration of the notice (*o*); for if the money should not be then ready to be paid, the mortgagee will be entitled to fresh notice; as it is only reasonable that he should have time afforded him to look out for a fresh security for his money; and in either of these cases, if the mortgagee should, as a matter of indulgence, consent to accept payment at less than six months' notice, he is entitled to the full amount of his interest for the six months.

Time to redeem.

Previous to the Statute of Limitations, 3 & 4 Will. IV., c. 27, the rule established regarding possession by mortgagees was, as stated by Lord Hardwicke, analogous to the old Statute of Limitations, 21 Jac. I., c. 19, viz., "that after twenty years' adverse possession by the mortgagee he should not be disturbed" (*p*). Where, however, the mortgagor was prevented from asserting his claim by reason of certain impediments mentioned as exceptions in the stat. 21 Jac. I., c. 16, viz., imprisonment, infancy, coverture, &c., in all such cases, by analogy to the statute, equity allowed ten years after the removal of the impediment (*q*). Also, an acknow-

Statute of Limitations.  
Old law,—21  
Jac. I., c. 16.

(*n*) *Brown v. Cole*, 14 Sim. 427.

(*o*) *Sharpnell v. Blake*, 2 Eq. Ca. Ab. 603.

(*p*) *Anon.*, 3 Atk. 313.

(*q*) *Beckford v. Wade*, 17 Ves. 99.

ledgment, given before the Statute of Limitations had fully run by the mortgagee, of the existence of the equity of redemption, would have taken the case out of the statute (*r*).

Present law.—  
3 & 4 Will. IV.,  
c. 27, s. 28, ex-  
plained by 7  
Will. IV. and  
1 Vict., c. 28.

The law on this subject was regulated, until the 1st January 1879, by the stat. 3 & 4 Will. IV., c. 27, s. 28, as explained by 7 Will. IV. and 1 Vict., c. 28, by which it was enacted, that whenever a mortgagee had obtained possession of the land comprised in his mortgage, the mortgagor should not bring a suit to redeem the mortgage but within twenty years (with or without ten years more for disability) next after the time when the mortgagee obtained possession, or next after any *written* acknowledgment of the title of the mortgagor, or of his right or equity of redemption, should have been given to him or his agent, signed by the mortgagee (*s*); and under the Real Property Limitations Act, 1874 (*t*), s. 7, the period of twenty years is now twelve years, and no further time is allowed for any disability (*u*), but otherwise the law is as it was under the previous statutes of limitation. It is to be observed that the statutes of limitation in relation to *land* bar and extinguish the title, and not merely the action or remedy of the dispossessed person (*v*); although in relation to personal property their effect is to merely bar the remedy without extinguishing the right. Also, it should be observed that the right of foreclosure in the mortgagee is not kept alive by the payment to him of rent by a tenant

(*r*) *Smart v. Hunt*, 4 Ves. 478 n.; and see *Markwick v. Hardingham*, 15 Ch. Div. 339.

(*s*) *Batchelor v. Middleton*, 6 Hare, 75; *Lucas v. Dennison*, 13 Sim. 584; *Stanfield v. Hobson*, 16 Beav. 236; *Thompson v. Bowyer*, 11 W. R. 975; *Hickman v. Upsall*, L. R. 2 Ch. Div. 617; and on appeal, 4 Ch. Div. 144. (*t*) 37 & 38 Vict., c. 57.

(*u*) *Kinsman v. Rouse*, 17 Ch. Div. 104; *Forster v. Patterson*, 17 Ch. Div. 132; and compare *Pugh v. Heath*, 7 App. Ca. 235.

(*v*) *Johnson v. Mounsey*, 11 Ch. Div. 284.

without the knowledge or subsequent adoption of the mortgagor (*w*).

With whatever strictness the ancient common law may have originally regarded the breach of the condition by the mortgagor, yet in modern times the doctrine of the court of equity recognising the mortgagor until foreclosure to be the actual owner of the land has been to some extent imported into the common law by the Legislature. By stat. 15 & 16 Vict., c. 76, ss. 219, 220, if, the mortgagor being in possession, an ejectment is brought by the mortgagee, provided no suit is pending in any court of equity for redemption or foreclosure, the payment of principal, interest, and costs will, except in certain cases, be deemed a satisfaction of the mortgage, and the mortgagee is thereupon to discontinue his action. And under the Judicature Act, 1873, "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession or for the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." Also, the mortgagor while he is in possession is not bound to account to the mortgagee for the rents and profits arising or accruing while in possession, even although the security should prove insufficient (*x*); in fact, he is not the bailiff or agent of the mortgagee.

Of the estate of the mortgagor.

15 & 16 Vict., c. 76.

Judicature Act, 1873, 36 & 37 Vict., c. 66, s. 25, § 5.

Mortgagor in possession not accountable for rents and profits.

But although the mortgagor remains thus the actual

(*w*) *Harlock v. Ashberry*, 18 Ch. Div. 229; reversed on appeal, 19 Ch. Div. 539.

(*x*) *Ex parte Wilson*, 2 Ves. & Beav. 252.



Restrained  
from waste if  
security be  
insufficient.

Mortgagor  
tenant at will  
to mortgagee.

Mortgagor  
could not make  
leases binding  
on mortgagee;  
*secus*, now.

owner of the land until foreclosure, still equity, regarding the land, with all its produce, as a security for the mortgage debt, will if necessary so restrain the mortgagor's right of ownership as that his ownership may not operate to the detriment of the mortgagee. Hence equity will, on a bill filed by the mortgagee, grant an injunction against the mortgagor's waste, *e.g.*, against the felling of timber by the mortgagor; but in order to grant the injunction in such a case, the court must first be satisfied that the security is insufficient (y). Neither will equity interpose its authority to obstruct the mortgagee from evicting the mortgagor from the possession, but will consider the latter as being for such purpose a mere tenant at will (z). Occasionally the mortgagee makes a re-demise of the mortgaged premises to the mortgagor, but more usually the mortgagor simply expresses that he attorns and becomes tenant to the mortgagee at a specified rent (a). Further, the mortgagor could not make a valid lease binding on the mortgagee, and if he attempted to make such a lease, the mortgagee might have ejected his lessee without notice (b); and as a consequence of this rule, both mortgagor and mortgagee used to combine in making the lease, wherever, at least (as in the case of mines), expense was to be incurred by the lessee, or there was a reasonable probability of the mortgagee proceeding to eviction. But now, under the Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 18, the mortgagor while in possession may make a valid lease (as may also the mortgagee while in possession), provided the lease do not exceed twenty-one years for an agricultural or occupation lease, and ninety-nine

(y) *Farrant v. Lovell*, 3 Atk. 723; *King v. Smith*, 2 Hare, 239; *Russ v. Mills*, 7 Gr. 145.

(z) *Cholmondeley v. Clinton*, 2 Mer. 359.

(a) *Ex parte Williams*, 7 Ch. Div. 138; *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335; *Ex parte Jackson*, *in re Bowes*, 14 Ch. Div. 725; and see *In re Kitchen*, 16 Ch. Div. 226.

(b) *Keech v. Hall*, Doug. 22.

years for a building (or repairing) lease; and provided the lease otherwise complies with the requisites of the Act; and where the mortgagor is the leasing party, he is to deliver to the mortgagee a counterpart of the lease.

The mortgagee, by virtue of his mortgage, becomes the legal owner of the land, and consequently entitled at law to immediate possession, or to the receipt of the rent if the land be in lease (c). Mortgagee entitled to possession.

The mortgagee is entitled, out of the profits, to repay himself all the necessary expenses attending the collection of the rents (d), and he may stipulate with the mortgagor for the appointment of a receiver to be paid by the mortgagor (e); and under the statute 23 & 24 Vict., c. 145, a power to require the appointment of a receiver was made an incident in every mortgage of lands, unless the mortgage deed expressly excluded such power; and the Conveyancing Act, 1881, ss. 19, 24, contains similar provisions. But courts of equity, fearful of opening a door to fraud, have imposed this restriction on the mortgagee, that he shall not be permitted to make any charge on the estate for his own personal trouble (f); nor appoint himself a receiver of the estate, although under an express agreement with the mortgagor for that purpose (g), for he is entitled to no benefit beyond his principal, interest, and costs. Receiver of mortgaged estates.  
Mortgagee shall not charge for personal trouble.

With regard to mortgagees of West India estates, and whether they may charge commission, the result of the cases appears to be, that whilst the mortgagee West India estates.

(c) *Coote*, 339.

(d) *Godfrey v. Watson*, 3 Atk. 518.

(e) *Davis v. Dendy*, 3 Mad. 170.

(f) *Godfrey v. Watson*, 3 Atk. 518.

(g) *French v. Baron*, 2 Atk. 120.

is out of possession, he may stipulate for the consignment of the produce, and charge commission on the net produce as a compensation for his trouble (*h*); but that when he is in possession, he stands in precisely the same situation as a mortgagee in possession in England; and consequently, if he chooses to be consignee himself, he has no commission (*i*).

Stipulation for lower rate of interest on punctual payment.

A stipulation that the mortgagee shall receive interest at £4 per cent. if regularly paid, but £5 per cent. if default is made, is good if £5 per cent. be reserved by the deed; and in the case of interest being so stipulated for, the higher and not the lower rate is taken upon redemption and foreclosure accounts (*j*). But if £4 per cent. only is reserved, a stipulation that £5 per cent. shall be paid if the interest be not regularly paid is in the nature of a penalty, against which the court will relieve (*k*). But the fines and penal payments contained in mortgages to building societies, being reasonable within the Building Society Acts, are recoverable in full (*l*).

Fines in building society mortgages.

Mortgagee must keep estate in necessary repair with surplus rents.

It is the duty of the mortgagee in possession to keep the premises in necessary repair. He will be entitled to all his lawful expenses attending the renewal of leases, or incurred in maintaining the title (*m*). But a mortgagee is not bound to lay out money on the estate except for necessary repairs, and that only to the amount of the surplus rents (*n*), nor can

(*h*) *Faulkner v. Daniel*, 3 Hare, 218.

(*i*) *Leith v. Irving*, 1 My. & K. 277; Coote, 343.

(*j*) *Union Bank of London v. Ingram*, 16 Ch. Div. 53; *Stains v. Banks*, 9 Jur. N.S. 1049.

(*k*) 2 Sp. 631; *Tipton Green Colliery Co. v. Tipton Moat Colliery Co.*, L. R. 7 Ch. Div. 192.

(*l*) *Parker v. Butcher*, L. R. 3 Eq. 762; *Ex parte Osborne*, in re Goldsmith, L. R. 10 Ch. App. 41; *In re N. and N. P. Benefit Building Society, Smith's Case*, L. R. 1 Ch. Div. 481; *Provident Permanent Building Society v. Greenhill*, 9 Ch. Div. 122; *Protector Endowment Co. v. Grice*, 5 Q. B. Div. 592.

(*m*) *Manlove v. Bale*, 2 Vernon, 87; *Godfrey v. Watson*, 3 Atk. 518.

(*n*) Coote, 344.

he, on the other hand, compel the mortgagor to advance money for the renewal of the leases without an express agreement between them to that effect (o).

When the mortgagee is in possession, he is considered in equity, in some measure, in the light of a trustee or bailiff for the mortgagor, and is accountable for the rents and profits of the land; and therefore, if *without the assent of the mortgagor*, he assigns over the mortgage to another, he will be held liable to account for the profits received *subsequently* even to the assignment, on the principle that having turned the mortgagor out of possession, it is incumbent on him to take care in whose hands he places the estate (p). The consequence of this rule of equity is, that the mortgagor is usually asked, and may easily be compelled, to concur in the assignment.

Mortgagee in possession must account.  
  
Even though he has assigned the mortgage.

But although the mortgagee is liable to account, he is not obliged to account according to the actual value of the land, nor is he bound by any proof that the land is worth so much, unless it can be proved that he made so much out of it, or might have done so but for his own wilful default, as if without cause he turned out a sufficient tenant who held it at so much rent, or refused to accept a tenant who would have given so much for it (q). This limited protection accorded to the mortgagee is so accorded to him because it is the laches of the mortgagor that he lets the land lapse into the hands of the mortgagee by the non-payment of the money; therefore, except as above mentioned, when the mortgagee enters, he is only accountable for what he actually receives, and is not bound to take the

Mortgagee is accountable for what he actually receives, or what but for his wilful default he might have received.

(o) *Manlove v. Bale*, 2 Vernon, 87; *Godfrey v. Watson*, 3 Atk. 518.

(p) Coote, 303; *National Bank of A. v. United Hand in Hand Co.*, 4 App. Ca. 391.

(q) Coote, 345; *Anon.* 1 Vern. 45; *Simmins v. Shirley*, L. R. 6 Ch. Div. 173; *Eyre v. Hughes*, L. R. 2 Ch. Div. 148.

trouble of making the most of another's property (r); and above all the mortgagee is not bound to work or to keep working, at a speculative profit, the minerals in the land mortgaged (s). The same rule, limiting the accountability of a mortgagee in possession, applies to the mortgagee selling under his power of sale (t).

Annual rests,  
—when and  
when not  
directed.

In taking a mortgagee's accounts, the rents are in general written off against interest; and if at the time the mortgagee takes possession, the interest on his principal money is not in arrear, and there is no other serious danger overhanging his security which his entry into possession was intended to forestall, then (as a general rule) the account will be taken with "annual rests," that is to say, if the rents exceed the amount of the interest, the excess will in every year of such excess be applied in reduction of the principal moneys due (u); but otherwise annual rests will not be directed.

Mortgagee  
until payment  
could not be  
compelled to  
produce his  
title-deeds;  
*secus*, now.

The mortgagee, without payment of principal, interest, and costs, could not be compelled by the mortgagor or his assigns to produce the title-deeds, even though their production was required for the purpose of enabling the mortgagor to negotiate a loan, and so to pay off the mortgage (v); but the law in this respect is now altered as regards all mortgages made subsequently to the 31st December 1881 (w). Also, upon redemption, the mortgagee must be in a position to hand over all the title-deeds, and will be liable in

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(r) Coote, 345.

(s) *Rowe v. Wood*, 1 Jac. & Walk. 315.

(t) *Mayer v. Murray*, 8 Ch. Div. 424.

(u) *Shephard v. Elliot*, 4 Mad. 254; *Patch v. Wild*, 30 Beav. 99; and see *Fisher on Mortgages*, 2d ed., 894.

(v) *Damer v. Lord Portarlington*, 15 Sim. 380; and see *Sheffield v. Eden*, 10 Ch. Div. 291.

(w) 44 & 45 Vict., c. 41, s. 16.

damages to the mortgagor for any title-deed that is missing or fraudulently disposed of (x).

It seems that a mortgagee cannot accept a valid lease from the mortgagor, even though free from circumstances of fraud, and at a fair rent,—the reason for this disability being the power which, if the law were otherwise, the mortgagee would possess of “harassing” the mortgagor (y).

Mortgagee cannot take a valid lease from mortgagor.

A further considerable disability formerly annexed to the mortgagee's estate was, that although at law the actual owner, he could not in equity make a valid or binding lease, unless of necessity, and to avoid a probable loss (z); and the consequence of this rule was that both the mortgagor and the mortgagee used to concur in making leases, wherever permanency of holding was desirable. But now, under the Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 18, the mortgagee while in possession may by himself, and without the concurrence of the mortgagor, make a valid lease, provided the lease do not exceed twenty-one years for an agricultural or occupation lease, and ninety-nine years for a building (or repairing) lease, and provided the lease otherwise complies with the requisites of the Act.

Mortgagee could not in equity make a binding lease; *secus*, now.

Equity holds that if leaseholds be in mortgage, and the mortgagee renew, he will take the renewed lease subject to the like equity as was subsisting in the old lease (a); and if an advowson be in mortgage, and the living become vacant, the mortgagor, and not the mortgagee, shall present (b); nor will equity permit the

Renewed leaseholds.

Advowson.

(x) *James v. Rumsey*, 11 Ch. Div. 398.

(y) *Webb v. Rorke*, 2 Sch. & Let. 661; *Coote*, 364; and see *Ex parte Buxton*, in *re Müller*, 15 Ch. Div. 289.

(z) *Hungerford v. Clay*, 9 Mod. 1.

(a) *Holt v. Holt*, 1 Ch. Ca. 190.

(b) *Mackenzie v. Robinson*, 3 Atk. 559.

mortgagor to agree to the contrary, for the mortgagee shall have no benefit beyond his principal, interest, and costs.

Mortgagee cannot fell timber.

Unless security be insufficient.

A further restriction on the estate of the mortgagee in possession is, that he shall not be permitted to waste the estate (c). If he proceed to fell timber, an account will be decreed, and the produce applied, first, in payment of the interest, and then in sinking the principal; and equity will grant an injunction against him unless the security prove defective, in which case the court will not restrain him from felling timber, the produce being of course applied in ease of the estate (d). The like rules apply to the opening of new mines (e). So, if the mortgagee unnecessarily pulls down buildings and erects new buildings without the consent of the mortgagor, he is liable for any loss of rent which is thereby occasioned (f).

The doctrine of tacking,—its principle.

With reference to the rights of mesne or intermediate incumbrancers, the doctrine of tacking has been thus stated: "*In æquali jure, melior est conditio possidentis*. Where equity is equal, the law shall prevail; and he that hath only a title in equity shall not prevail against law and equity. As a purchaser or mortgagee comes in upon a valuable consideration without notice, upon purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first, and before the last mortgage, though he purchased in the first incumbrance, after he had notice of the second mortgage; for he hath both law and equity" (g). In con-

(c) *Hanson v. Derby*, 2 Vern. 392.

(d) *Withrington v. Bankes*, Sel. Ch. Ca. 30.

(e) *Hanson v. Derby*, 2 Vern. 392; *Millet v. Davey*, 31 Beav. 470.

(f) *Sandon v. Hooper*, 6 Beav. 246; 14 L. J. Ch. 120.

(g) 2 Fonblanque on Eq. 302, 5th ed.

sidering this rule of equity, Lord Hardwicke has remarked (*h*), that it could not happen in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and therefore, as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and therefore, where there is a legal title and there is also equity on one side, the Court of Chancery never thought fit, that by reason of a prior equity against a man who has a legal title, that man shall be hurt, and this by reason of the force which the court necessarily and rightly allows to the common law and to legal titles; but if this had happened in any other country, it could never have been made a question, for if the law and equity are administered by the same jurisdiction, the rule *qui prior est tempore, potior est jure*, must hold (*i*). However, since the fusion of the two jurisdictions of law and equity by the Judicature Acts, 1873-75, the cause alleged by Lord Hardwicke for the origin of tacking has been removed, and yet the doctrine itself continues unaffected: which shows, either that the assigned origin is not the origin, or else that results may survive the causes which have brought them about. *Tacking will not prevail against the equity Act.*

Doctrine of  
tacking,—  
its origin.

The leading principles or rules of the doctrine of tacking are fully stated in the case of *Brace v. Duchess of Marlborough* (*j*). The doctrine of tacking,—its rules.

1. "That if a third mortgagee buys in the first mortgage, being a legal mortgage, though it be *pendente lite*, 1. Third mortgagee without notice of

(*h*) *Wortley v. Birkhead*, 2 Ves. Sr. 574.

(*i*) *Rooper v. Harrison*, 2 K. & J. 108, 109.

(*j*) 2 P. W. 491; and see (regarding the rule in *Toulmin v. Steere*, 3 Mer. 210) *Adams v. Angell*, L. R. 5 Ch. Div. 634; *Cracknell v. Janson*, L. R. 6 Ch. Div. 735.



second, buying in first mortgage with notice of second, may tack. pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side and equal equity, he shall squeeze out the second mortgagee, and this the Lord Chief-Justice Hale called a 'plank' gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*."

Because he is without notice when he parts with his first cash.

In this case it must carefully be noted, that although the third mortgagee get in the first mortgage, *pendente lite*, i.e., *with notice*, he shall, nevertheless, be allowed to tack. The principle on which the doctrine is founded is thus explained (k):—"The rule of equity requires no more than that *the third mortgagee should not have had notice of the second at the time of lending the money; for it is by lending the money without notice that he becomes an honest creditor, and acquires the right to protect his debt*. But he is not compelled to look for this protection till his debt is in danger of being prejudiced; and, therefore, when that danger is discovered to him, whether it be by suit in equity or by an extra-judicial means, as the honesty of his debt is not affected by the discovery, so the right of protecting that debt, and the efficacy of such protection, are not prejudiced; hence arose the rule which permitted the subsequent incumbrancers to purchase *pendente lite*" (l).

★

And may therefore protect his honest debt against subsequently discovered dangers.

By transfer of legal estate, if outstanding in person having no privity with prior incumbrancers.

Although if the legal estate be outstanding in a third person who has no privity with the several incumbrancers, the party obtaining it would have priority, yet where the legal owner is *trustee for all*, he cannot create a priority by subsequently transferring the estate to any or either of them in particular. Thus, if an owner having the legal estate create a charge in

(k) 1 Eden. 530.

(l) *Marsh v. Lee*, 1 L. C. 659; *Morret v. Paske*, 2 Atk. 52; *Wilmot v. Pike*, 5 Hare, 14.

favour of A., then a second charge in favour of B., and then a third in favour of C., he cannot alter the equities by transferring the legal estate to any of them (m).

2. That if a judgment-creditor buys in the first mortgage, although, being a legal mortgage, he shall not tack or unite the mortgage to his judgment, and thereby gain a preference; for such judgment-creditor cannot be called a purchaser; for he has by his judgment only a lien on (n) or inchoate right against the land, but *non constat*, whether he will ever make use of it, for he may take his debt out of the goods of his debtor by *feri facias*; besides which, the judgment-creditor does not lend his money on the immediate view or contemplation of the land, nor is he deceived or defrauded though his debtor had before made twenty mortgages of his estate; but a mortgagee is defrauded or deceived if the mortgagor has already mortgaged his land to another (o). and a purchaser is not a purchaser.

2. Judgment-creditor buying in the first mortgage shall not tack.

Judgment-creditor not a purchaser.

He did not lend his money in contemplation of the land.

It would seem from the principles laid down in the judgment in *Whitworth v. Gaugain* (p), that the law in this respect has not been altered by the 1 & 2 Vict., c. 110; for if the effect of the judgment is only to charge the interest which the debtor has remaining in him, the creditor can have no right, by means of tacking, to cut off an incumbrance which preceded his judgment (q).

Law unaltered by 1 & 2 Vict., c. 110.

Judgment can only affect what the debtor had to part with.

But as by 27 & 28 Vict., c. 112, s. 2, judgment-

Law how far altered by 27 & 28 Vict., c. 112.

(m) *Sharples v. Adams*, 11 W. R. 450; 32 Beav. 213; *Mumford v. Stohwasser*, L. R. 18 Eq. 556. *Pilcher v. Rawlins*, L. R. 7 Ch. App. 259, is distinguishable.

(n) But see now 27 & 28 Vict., c. 112.

(o) *Lacy v. Ingle*, 2 Ph. 413; *Spencer v. Pearson*, 24 Beav. 266.

(p) 3 Hare, 416; and see *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. App. 567.

(q) *Coote*, 409; *Kinderley v. Jervis*, 22 Beav. 1; *Beavan v. Lord Oxford*, 6 De G. M. & G. 507.

creditors are for the future deprived of their lien on real estates, until such land has been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority, it appears that a judgment-debt cannot now be tacked unless such delivery has been made.

3. First mortgagee lending a further sum on a judgment may tack against a mesne mortgagee.

3. That if a first mortgagee, being a legal mortgagee, lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee until both his securities are satisfied (r); and *à fortiori* if the first mortgagee lends on a mortgage (s).

But first mortgagee must have the legal estate or the better right to call for it.

This rule results from the doctrine already noticed, that where equity is equal the law shall prevail. But this principle will not apply unless the first mortgagee *has the legal estate or the better right to call for it*; for otherwise the incumbrancers will be payable according to the priority of their respective incumbrances; nor will the rule apply if the mortgagee had notice of the mesne incumbrance at the time of making the further advance (t).

And must make the advance without notice.

First mortgagee must not have notice of the mesne incumbrance.

And it has further been decided, that although the first mortgage was made to secure a sum and *further advances*, if the first mortgagee make a further advance with notice of a mesne incumbrance, he will not be entitled to priority in respect of such further advance (u).

4. Where legal estate is outstanding, incumbrancers rank according to time.

4. When a puisne mortgagee has bought in a prior incumbrance, but the legal estate is vested in a trustee,

(r) *Shepherd v. Titley*, 2 Atk. 348.

(s) *Wyllie v. Pollen*, 11 W. R. 1081.

(t) Coote on Mortgages, 409; see *Credland v. Potter*, L. R. 10 Ch., App. 8.

(u) *Shaw v. Neale*, 20 Beav. 157; *Rolt v. Hopkinson*, 9 H. L. Cas., 514; *London and County Bank v. Radcliffe*, 6 App. Ca. 722. These cases appear to have overruled *Gordon v. Graham*, 2 Eq. Ca. Abr. 598.

or the puisne mortgagee has not obtained the legal title, or he takes *en autre droit* (v), the court clearly holds that the puisne mortgagee can make no advantage of his prior incumbrance, because in all cases where the legal estate is outstanding, the several incumbrancers must be paid according to their priorities in point of time,—*qui prior est tempore, potior est jure*.

But if any one of the incumbrancers has a better title to call for an assignment or conveyance of the legal estate, as, for instance, when a declaration of trust of the legal estate has been made in his favour, he will be placed in equity in the same situation as if he had obtained an actual assignment (w). Unless one of the incumbrancers has a better title to call for the legal estate.

It appears that a prior mortgagee having a bond debt, whether prior or subsequent to his mortgage (x), cannot tack it against any intervening incumbrancer by mortgage, or even against an intervening judgment or bond creditor (y), or even against the mortgagor himself (z), or as against a purchaser of the equity of redemption; but only as against the heir (a), or as against the beneficial devisee (b); and this for the sole purpose of preventing circuitry of action (c). And since 3 & 4 Will. IV., c. 104, it seems a simple contract debt may be tacked against the heir or devisee where there is not a devise for payment of debts (d). In other words, the bond debt cannot be tacked at all during the life of the mortgagor, but only after his When a bond debt may be tacked,—  
(a.) During life of debtor, —never.  
(b.) After death of debtor, —only as against volunteers.

(v) *Morret v. Pask*, 2 Atk. 52.

(w) *Pomfret v. Windsor*, 2 Ves. Sr. 487; *Allen v. Knight*, 5 Hare, 272; *Wilmot v. Pike*, 5 Hare, 14; *Cooke v. Wilton*, 29 Beav. 100.

(x) *Windham v. Jennings*, 2 Ch. Rep. 247.

(y) *Lowthian v. Hasel*, 3 Bro. C. C. 162.

(z) *Jones v. Smith*, 2 Ves. 376.

(a) *Shuttleworth v. Laycock*, 1 Vern. 245.

(b) *Challis v. Casborn*, 1 Eq. Ca. Ab. 325; *Du Vigier v. Lee*, 2 Hare, 326.

(c) *Heams v. Bance*, 3 Atk. 630; *Coot*, 391–393; and see *Talbot v. Frere*, 9 Ch. Div. 568.

(d) *Coot*, 402; *Sp.* 723–725, 735.

death upon an administration of his assets, when of course it will be preferred to the heir or beneficial devisee (e).

Tacking abolished by Vendor and Purchaser Act, 1874, and restored by Land Transfer Act, 1875.

By 37 & 38 Vict., c. 78, s. 7, the doctrine of tacking was abolished as regards estates and interests created after the 7th August 1874, but by the Land Transfer Act, 1875 (f), which came into operation on the 1st January 1876, it is enacted as follows:—"The seventh section of the Vendor and Purchaser Act, 1874, is hereby repealed, as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of this Act."

Priority may be lost by mortgagee's fraud.

The right of priority may be lost by fraud. "If a man by the suppression of the truth which he was bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience that his claim should be postponed to that of the person whose confidence was induced by his representation" (g).

Priority may be lost by mortgagee's negligence inducing deception.

A mortgagee may also lose his priority by his own negligence. Thus A., a mortgagee of leasehold property, lent the lease to the mortgagor for the purpose of obtaining a further advance upon it, but at the same time told the mortgagor to inform the person of whom he proposed to obtain the money that A. had a prior charge. The mortgagor deposited the lease with his banker's without informing them of A.'s mortgage. On a bill for foreclosure by A., it was held that, as A. by his negligence had put it into the mortgagor's

(e) *In re Haselfoot's Estate, Chauntler's Claim*, L. R. 13 Eq. 327.

(f) 38 & 39 Vict., c. 87.

(g) 1 Fonblanque on Eq. 64; Coote, 415.

power to commit a fraud, his security must be postponed to that of the banker's (*h*).

A solicitor is usually liable as for negligence in not discovering a mesne mortgage; and the measure of damages is the amount of the incumbrance (*i*).

As a general rule, and as regards all mortgages made prior to the 1st January 1882, but not, in general, mortgages made after that date, both in suits for foreclosure and in suits for redemption, the mortgagor cannot redeem one mortgage without redeeming all other mortgages which the mortgagee holds upon any part of his property; for these the mortgagee has a right to consolidate together (*j*). And this rule is applicable as well to mortgages of realty (*k*) as to mortgages of personalty (*l*), and holds good against a purchaser for value of the equity of redemption, and also against a subsequent mortgagee thereof, although each is without notice of the other mortgages (*m*). But there is no consolidation, where there is no default in payment of the mortgage money (*n*); and there is no consolidation where one of the mortgages has ceased to exist (*o*).

Consolidation of mortgages. Mortgagor must redeem all the mortgages which the mortgagee holds on his property.

The doctrine of consolidation depends upon a principle altogether different from that upon which tacking depends. Because in tacking, the right is to throw

Consolidation distinguished from tacking.

(*h*) *Briggs v. Jones*, L. R. 10 Eq. 92; and see *Credland v. Potter*, L. R. 10 Ch. App. 8; *Keate v. Phillips*, 18 Ch. Div. 560.

(*i*) *Whiteman v. Hawkins*, 4 C. P. Div. 13.

(*j*) *Selby v. Pomfret*, 1 J. & H. 336; 9 W. R. 583; *Phillips v. Guttridge*, 4 De G. & Jo. 531; *Tassel v. Smith*, 2 De G. & Jo. 713-718, explained in *Mills v. Jennings*, 13 Ch. Div. 639, and overruled in *Jennings v. Jordan*, 6 App. Ca. 698.

(*k*) *Neve v. Pennell*, 11 W. R. 986.

(*l*) *Watts v. Symes*, 1 De G. M. & G. 240; *Tweeddale v. Tweeddale*, 23 Beav. 341. But see *Chesworth v. Hunt*, 5 C. P. Div. 266.

(*m*) *Bevor v. Luck*, L. R. 4 Eq. 537, explained in *Baker v. Gray*, L. R. 1 Ch. Div. 491.

(*n*) *Cummins v. Fletcher*, 14 Ch. Div. 699.

(*o*) *In re Raggett, Ex parte Williams*, 16 Ch. Div. 117.

cannot be restrained if he chooses to proceed in the Chancery Division (*w*). A foreclosure action cannot be brought but within twelve years next after the right to bring such action first accrued, or within twelve years after the last written acknowledgment, or after the last payment of any part of the principal money or interest (*x*); and only six years' arrears of interest are recoverable as against the land (*y*). The remedy of a debenture-holder is usually the appointment of a receiver (*z*).

(b.) Sale,—  
either,

(1.) Under Con-  
veyancing Act,  
1881, by order  
of the court;

Before the statute 15 & 16 Vict., c. 86, courts of equity, except in a few cases, refused to decree a sale against the will of the mortgagor; but under that statute, sec. 48, the Court of Chancery was enabled to direct a sale of mortgaged property instead of a foreclosure, but the order for a sale was not to be made on an interlocutory application (*a*). However, the section in question has now been repealed by the Conveyancing Act, 1881, and the like provisions have been enacted in section 25 of the last-mentioned Act, and the sale may be directed on such terms as the court thinks fit, and without previously determining the priorities of incumbrancers, and even upon an interlocutory application (*b*). Also, under the same section of that Act, the court has jurisdiction to order the sale of the mortgaged property, and whether in a foreclosure or in a redemption action, at any time before the action is concluded by foreclosure absolute (*c*).

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(*w*) *Ex parte Fletcher, in re Hart*, 9 Ch. Div. 381; 10 Ch. Div. 610; *Ex parte Hirst, in re Wherley*, 11 Ch. Div. 278.

(*x*) 3 & 4 Will. IV., c. 27, ss. 24, 28; 7 & 8 Will. IV. and 1 Vict., c. 28; Coote, 449. And see the Real Property Limitation Act, 1874.

(*y*) *In re Stead's Mortgaged Estates*, L. R. 2 Ch. Div. 713; and see *Hickman v. Upsall*, L. R. 2 Ch. Div. 617, and, on appeal, 4 Ch. Div. 144.

(*z*) *In re Herne Bay Co.*, 10 Ch. Div. 43.

(*a*) *London and County Banking Co. v. Dover*, 11 Ch. Div. 204.

(*b*) *Wooley v. Colman*, W. N. 1882, p. 88.

(*c*) *Bank of London v. Ingram*, 20 Ch. D. 463.

A power of sale, even before that Act, was usually inserted in mortgage deeds, giving the mortgagee authority to sell the premises; but such a power was only permitted where the mortgaged land did not exceed in value the money lent; for if the security were very ample, it was not likely that the mortgagor would consent to such a power being given to the mortgagee, in case default should be made in payment; and the concurrence of the mortgagor in the sale is not necessary to perfect the title of the purchaser (d). The mortgagee having sold, is at liberty to retain to himself principal, interest, and costs; and having done this, the surplus, if any, must be paid over to the person or persons who (but for the sale) would have been entitled to redeem; and of such surplus the selling mortgagee is a trustee; but he is not otherwise a trustee as regards his exercise of the power of sale (e).

Also, under the statute 23 & 24 Vict., c. 145, s. 11, Or (3.) under repealed and re-enacted by the Conveyancing Act, 1881, ss. 19, 20, 21, and 22, a power of sale, unless expressly excluded by the mortgage deed, has been rendered incident to every mortgage or charge by deed affecting any hereditaments of any tenure. This power, however, is not to be exercised unless and until either (1.) Notice requiring payment of the mortgage money has been given and been followed by three months' default; or (2.) Interest is in arrear for two months after becoming due; or (3.) There has been a breach of some provision (other than the covenant to repay) contained in the mortgage deed or in the Act. Also, under the same Act, the mortgagee may appoint a receiver of the rents and

(d) *Corder v. Morgan*, 18 Ves. 344; *Newman v. Selfe*, 33 Beav. 522; *Dicker v. Angerstein*, L. R. 3 Ch. Div. 600.

(e) *Warner v. Jacob*, 20 Ch. Div. 220; and see *Hoole v. Smith*, 17 Ch. Div. 434; *Cockburn v. Edwards*, 16 Ch. Div. 393; 18 Ch. Div. 449.



profits of the mortgaged property, and the mortgage deed occasionally contains an express power to make such an appointment (*f*).

Where mortgaged property is taken by compulsory purchase, the compensation-moneys go to the mortgagee, including the proportion paid for goodwill (if any) attaching to the premises (*g*).

Compensation,  
—on compulsory  
purchase.

(*c*.) Distress,—  
for interest,  
and even for  
principal.

Where the mortgage deed contains an attornment clause, the mortgagee may also (like a landlord for his rent) distrain upon the mortgaged premises (the distrainable articles therein) for the arrears of his interest, and sometimes even for a large part of the principal money lent, provided the attornment clause is not fraudulent (*h*). But such attornment clause must be registered as a bill of sale.

A

Mortgagee  
may pursue  
all his remedies  
concurrently.

If a debt be secured by the mortgage of real estate, and also collaterally by covenant or by bond, the mortgagee may pursue all his remedies at the same time (*i*). If the mortgagee obtain full payment on the bond or covenant, the mortgagor is by the fact of payment entitled to a reconveyance of the estate, and foreclosure is rendered unnecessary. But if the mortgagee obtains only part payment on the bond or on the covenant, he may institute or go on with his foreclosure action, and giving credit in account for what he has received on the bond or covenant, he may foreclose for nonpayment of the remainder. On the other hand, if he obtains a foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is

If mortgagee  
foreclose first,  
and then sue  
on the cove-  
nant, he opens  
the foreclosure,  
and mortgagor  
may redeem.

(*f*) *Hawkes v. Holland*, W. N. 1881, p. 128.

(*g*) *Pile v. Pile*, *ex parte Lambton*, L. R. 3 Ch. Div. 36.

(*h*) *Ex parte Williams*, 7 Ch. Div. 138; *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335; *Ex parte Jackson*, *in re Bowes*, 14 Ch. Div. 725; *Ex parte Punnet*, *in re Kitchen*, 16 Ch. Div. 226.

(*i*) *Lockhart v. Hardy*, 9 Beav. 349; *Marshall v. Shrewsbury*, L. R. 10 Ch. App. 250.

not absolutely precluded from suing on the bond or covenant; but it is held that by doing so he gives to the mortgagor a renewed right to redeem the estate and get it back, or, in other words, he thereby opens the foreclosure, and consequently upon the commencement of an action against the mortgagor on the bond after foreclosure, the mortgagor may commence an action, or even, *semble*, counter-claim, for redemption, and upon payment of the whole debt secured by the mortgage, he is entitled to have the estate back again and the securities given up. After foreclosure, therefore, the court will not restrain the mortgagee from suing on the bond, *provided he retains the mortgaged estate in his power*, ready to be redeemed in case the mortgagor should think fit to avail himself of the foreclosure (*j*); but if, on the other hand, the mortgagee has so dealt with the mortgaged estate as to be unable to restore it to the mortgagor on full payment (*k*), the court will prevent his suing at law on the bond or covenant to receive the residue of the mortgaged money (*l*). A foreclosure decree is almost always liable to be opened, even after a long interval of time and intermediate dealings with the property; in other words, a mortgagor may redeem even after foreclosure absolute, but only upon terms of the strictest equity (*m*).

Mortgagee must therefore have the estate in his power.

There is a class of cases in which the question has been, whether it is intended by the parties making the mortgage that the equity of redemption shall be limited in a manner different from the uses subsisting in the estate prior to the mortgage, or shall result to the same uses. These questions have generally arisen in mortgages by husband and wife of the wife's estate; and the principle of equity in such cases is, that if

The equity of redemption follows the limitations of the original estate.

(j) 2 Sp. 682.

(k) *Lockhart v. Hardy*, 9 Beav. 349.

(l) *Palmer v. Hendrie*, 27 Beav. 349.

(m) *Campbell v. Holyland*, L. R. 7 Ch. Div. 166.

deposit is entitled to the remedy by foreclosure (*f*); but, of course, he is also entitled to a sale (*g*).

Origin of the doctrine.

In *Keys v. Williams* (*h*), Lord Abinger said: "The doctrine of equitable mortgages has been said to be an invasion of the Statute of Frauds. . . . But in my opinion that statute was never meant to affect the transaction of a man borrowing money and depositing his title-deeds as a pledge of payment. A court of law could not assist such a party to recover back his title-deeds by an action of trover; the answer to such an action being, that the title-deeds were pledged for a sum of money, and that till the money is repaid the party has no right to them. So, if the party came into equity for relief, he would be told that before he sought equity he must do equity by repaying the money in consideration for which the deeds had been lodged in the other party's hands."

Deposit of deeds covers further advances,

In *Russel v. Russel* (*i*) it was decided that the deeds were a security for the sum advanced at the time of the deposit, and only for that sum. But this rule has been extended, and it is now held that such a deposit will cover future advances, if such was the agreement when the first advance was made; or if it can be proved that a subsequent advance was made on an agreement, express or implied, that the deeds were to be a security for it as well (*j*). An equitable mortgage by deposit carries interest at the rate of £4 per cent. (*k*).

and interest.

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(*f*) *Pryce v. Bury*, L. R. 16 Eq. 153 n.; *James v. James*, *ibid.*; and see *Marshall v. Shrewsbury*, L. R. 10 Ch. App. 250; *Backhouse v. Charlton*, 8 Ch. Div. 444.

(*g*) *York Union Banking Co. v. Astley*, 11 Ch. Div. 205.

(*h*) 3 Y. & C. Exch. Ca. 55, 61.

(*i*) 1 L. C. 726.

(*j*) *Ex parte Kensington*, 2 V. & B. 83; *Ede v. Knowles*, 2 Y. & C. C. C. 172; *James v. Rice*, 5 De G. M. & G. 461.

(*k*) *Re Kerr's Policy*, L. R. 8 Eq. 331.

Where there has been a deposit of title-deeds for the purpose of preparing a legal mortgage, the balance of authority seems to be in favour of the proposition that a delivery of deeds for the purpose of preparing a legal mortgage constitutes, in fact, a valid interim equitable mortgage (*l*),—that interim effect being not inconsistent with the expressed purpose of the deposit of title-deeds.

Deposit of deeds for purpose of preparing a legal mortgage.

A parol agreement to deposit title-deeds for a sum of money advanced does not without an actual deposit constitute a good equitable mortgage (*m*); but if in writing, such an agreement would be good without an actual deposit.

Parol agreement to deposit deeds for money advanced.

It is now clearly decided that in order to create an equitable mortgage it is not necessary that all the title-deeds, or even all the material title-deeds, should be deposited; it is sufficient if the deeds deposited are material to the title, and are proved to have been deposited with the intention of creating a mortgage (*n*).

All title-deeds need not be deposited.

Where land has been registered with an indefeasible title, the land certificate (and not the title-deeds) is the proper document to deposit (*o*).

Deposit of land certificate.

An equitable mortgagee who parts with the title-deeds, and so enables the depositor to make another equitable mortgage, may be postponed to such second equitable mortgagee by reason of his laches in not getting back the deeds—on the principle that, as be-

Equitable mortgagee parting with the title-deeds to mortgagor.

(*l*) 1 L. C. 733.

(*m*) *Ex parte Coombe*, 4 Mad. 249; *Ex parte Farley*, 1 M. D. & De G. 683.

(*n*) *Lacom v. Allen*, 3 Drew. 579; *Roberts v. Craft*, 24 Beav. 223; 2 De G. & Jo. 1.

(*o*) Fisher on Mortgages, 2d ed., pp. 41, 42.

tween two innocent parties, the one must suffer who has permitted the fraud to be committed (*p*).

Equitable mortgagee has priority to subsequent legal mortgagee, with notice. Legal mortgagee postponed to prior equitable mortgagee, if former has been guilty of fraud or gross negligence. Not postponed if he has made *bond fide* inquiry after the deeds.

Gross and wilful negligence tantamount to fraud.

Absence of inquiry after deeds presumptive evidence of fraud.

An equitable mortgagee by deposit of title-deeds will be entitled to priority over a subsequent legal mortgagee who advanced his money *with notice* of the deposit (*q*). And constructive notice will suffice for this purpose; but mere incaution will not prevent the legal mortgagee from asserting his priority over the prior equitable mortgagee. The principles which govern this class of cases are thus summarised by Turner, V.C., in *Hewitt v. Loosemore* (*r*): "That a legal mortgagee is not to be postponed to a prior equitable one upon the ground of his not having got in the title-deeds, unless there be fraud or gross and wilful negligence on his part; that the court will not impute fraud or gross or wilful negligence to the mortgagee if he has *bond fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the court will impute fraud or gross and wilful negligence to the mortgagee if he omits all inquiry as to the deeds; and I think there is much principle both in the rule itself and in the distinctions upon it. When this court is called upon to postpone a legal mortgagee, its powers are invoked to take away a legal right; and I see no ground which can justify it in doing so except fraud or gross and wilful negligence, which in the eye of this court amounts to fraud; and I think that in transactions of sale and mortgage of estates, if there be no inquiry as to the title-deeds which constitute the sole evidence of the title to such property, the court is justified in assuming that the purchaser or mortgagee has abstained from making the inquiry from a suspicion that his title would be affected if it was

(*p*) *Waldron v. Sloper*, 1 Drew. 193.

(*q*) *Hiern v. Mill*, 13 Ves. 114; *Jones v. Williams*, 5 W. R. 540.

(*r*) 9 Hare, 458.

made, and is, therefore, bound to impute to him the knowledge which the inquiry if made would have imparted. But I think, if a *bond fide* inquiry is made, and a reasonable excuse given, there is no ground for imputing the suspicion, or the notice which is consequent upon it; but the person who accepts the excuse will afterwards have the burden of showing that it was a reasonable one for any prudent lender of money to accept" (s).

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(s) *Spencer v. Clarke*, 9 Ch. Div. 137.

## CHAPTER XVIII.

## OF MORTGAGES AND PLEDGES OF PERSONALTY.

Differences  
between a  
mortgage  
and a pledge  
of personalty :  
(a.) In their  
own nature.

A MORTGAGE of personal property differs from a pledge. The mortgage is a conditional transfer or conveyance of the very property itself, the interim possession usually remaining with the mortgagor; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in the case of a mortgage of lands. A pledge, on the other hand, passes the possession immediately to the pledgee, who acquires at the same time a special property only in the article pledged, with a right of retaining same until the debt is discharged (a). *RS*.

(b.) As regards  
remedies.

In cases of pledges, if a time for the redemption be fixed by the contract, still the pledgor may redeem afterwards, if he applies within a reasonable time. But if no time is fixed for the payment, the pledgor has his whole life to redeem, unless he is called upon to redeem by the pledgee; and in case of the death of the pledgor without such demand, his personal representatives may redeem (b).

Remedy of a  
pledgor, as a  
general rule, is  
at law, and  
only excep-  
tionally in  
equity.

Generally speaking, the remedy of the pledgor or his representatives is at law. But if any special ground is shown, as if an account or discovery is wanted, or there has been an assignment of the pledge, a bill will lie in equity (c).

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(a) St. 1030; *Jones v. Smith*, 2 Ves. Jr. 378.

(b) *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Kemp v. Westbrook*, 1 Ves. Sr. 278.

(c) *Jones v. Smith*, 2 Ves. Jr. 372.

On the other hand, the pledgee may bring a bill in equity to sell the pledge (*d*). It seems, also, that the pledgee may, after the time for redemption has passed, upon due notice given to the pledgor, sell the pledge without a judicial decree for sale (*e*).

Remedy of a pledgee, as a general rule, is in equity; but pledgee may also sell, on notice to pledgor.

In mortgages of personal property, although the prescribed condition has not been fulfilled, there exists, as in mortgages of land, an equity of redemption, which may be asserted by the mortgagor, if he brings his bill to redeem within a reasonable time (*f*). There is, however, a difference between mortgages of land on the one hand, and mortgages and pledges of personal property on the other, in regard to the rights of the parties after a breach of the condition. In such a case, there is no necessity in mortgages of personalty or in pledges (as there usually is in mortgages of realty) to bring a bill of foreclosure; but the mortgagee or pledgee, upon due notice, may sell the personal property mortgaged or pledged. The reason of this difference seems to be the same in principle with that on which equity, as a general rule, refuses to decree a specific performance of an agreement concerning personal chattels; namely, that other things of the same kind, and of the very same worth, even to the owner himself, may be purchased for the sum which the articles in question fetch; and, therefore, if such property is mortgaged, the mortgagee may properly be allowed to sell it, on due notice, without the inconvenience of filing a bill of foreclosure (*g*).

Differences between a mortgage of realty and a mortgage or pledge of personalty:

(*a*.) As regards remedies.

It appears that in the absence of express agreement

(*d*) *Ex parte Mountford*, 14 Ves. 606, explained in *Fisher on Mortgages*, 2d ed., p. 498 n. (*i*), and *Cartier v. Wake*, L. R. 4 Ch. Div. 605.

(*e*) *Kemp v. Westbrook*, 1 Ves. Sr. 278; *Leckwood v. Ewer*, 9 Mod. 278; *Pothonier v. Dawson*, Holt's N. P. 385; St. 1053.

(*f*) *Kemp v. Westbrook*, 1 Ves. Sr. 278.

(*g*) *Smith's Manual*, 339.



Pledgee's  
right of  
transfer.

✓ to the contrary, a pledgee may, *even before condition broken*, deliver over the pledge to a purchaser or to a sub-pledgee; and in either case, if the pledge is of a negotiable instrument, the pledgor will be bound; but if the pledge is of a non-negotiable instrument, the pledgor is bound only to the extent of the pledgee's own right: accordingly, in the case of a non-negotiable instrument, if the purchaser or sub-pledgee, upon tender to him by the pledgor of the amount due to the original pledgee, should refuse to deliver up the pledge to the original pledgor, the original pledgor may have an action of detinue against the party so refusing (h).

(b.) As regards  
tacking.

The doctrine of tacking is applied to mortgages and pledges of personalty, as against the party making them more extensively than as against a mortgagor of real estate; the presumption against the mortgagor or pledgor of personalty being, that if the mortgagee or pawnee advance any further sum of money to the mortgagor or pawnor, the mortgage or pledge is to be held until the subsequent debt or advance is paid, as well as the original debt; and this without any distinct proof of any contract for that purpose, such as it is necessary to prove in mortgages of real property (i).

Judgment and  
simple con-  
tract debts  
may be tacked.

Thus, where a policy on the life of A. had been effected under circumstances which amounted to an assignment of it by way of mortgage to B., to secure a sum lent by him to A., it was held that B. might tack, and retain the proceeds of the policy in satisfaction of a subsequent judgment debt (j). This de-

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(h) Fisher on Mortgages, 2d ed., p. 71.

(i) *Demainbray v. Matcalfe*, 2 Vern. 691; Sp. 772.

(j) *Spalding v. Thomson*, 26 Beav. 637.

cision has recently been followed in the case of subsequent debts by simple contract (*k*); but more recently, the right to tack in these cases has been denied (*l*).

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(*k*) *In re Haselfoot's Estate*, L. R. 13 Eq. 327.

(*l*) *Talbot v. Frere*, 9 Ch. Div. 568, in which *Spalding v. Thompson*, *supra*, and *In re Haselfoot's Estate*, *supra*, are commented upon by Jessel, M.R.

## CHAPTER XIX.

## OF LIENS.

Varieties of  
lien,—at law  
and in equity,  
and founda-  
tion of the  
equitable  
jurisdiction  
in lien.

OF liens there are many varieties. Thus, a lien may exist in favour of artisans and others, who have bestowed their labour and services in or towards the repair, improvement, and preservation of the property in respect of which the lien is claimed. A lien has also an existence, in many other cases, by the usages of trade; and in maritime transactions, as in the cases of salvage and general average. It is often created and sustained in equity where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money. Moreover, a lien even at law is not always confined to the very property upon which the labour or services have been bestowed; but it often is, by the usage of trade, extended to cases of a general balance of accounts, *e.g.*, in favour of factors and others. Consequently, most cases of lien either in themselves involve a foundation for the jurisdiction of equity, or give rise to matters of account; and as the nature of the lien and the amount of the account are often involved in great uncertainty, a resort to a court of equity is in many cases absolutely indispensable for the purposes of justice.

Diversities  
among liens.

The principal diversities among liens appear to be the following:—

(*a.*) A *particular* lien on goods,—which is confined to the particular charge; and a *general* lien on goods,

—which extends not only to the particular account but also to the general balance of the accounts (a).

(b.) A lien on *lands*,—which commences only when the possession of the lands is parted with to the purchaser; and a lien on *goods*,—which lasts only while the possession is retained by the vendor, and which ceases when it is parted with to the purchaser (b). And,—

(c.) The lien of a solicitor on the *deeds and documents* of his client,—which arises *proprio vigore*, but which at the most is only a passive protection; and the lien of a solicitor on a *fund recovered*,—which arises only upon the court's declaring the solicitor entitled to it, and which is in all cases (when once declared) both an active and (comparatively speaking) an immediate remedy and redress.

The lien which a solicitor has on the deeds, books, and papers of his client for his costs is an instance of a lien originating in custom, and afterwards sanctioned by decisions at law and in equity. This lien is a right not depending upon contract; it wants the character of a mortgage or pledge; it is merely an equitable right to withhold from his client such things as have been intrusted to him as a solicitor, and with reference to which he has given his skill and labour, and not (as already suggested) a right to enforce any active claim against his client (c); and *nota bene* the deeds, &c., must have come to the solicitor's hands in his character of solicitor, and not otherwise (d).

The lien of a solicitor on deeds, books, &c.

(a) *In re Witt, ex parte Shubbrook*, L. R. 2 Ch. Div. 489.

(b) *Grice v. Richardson*, 3 App. Ca. 319; *Ex parte Willoughby, in re Westlake*, 16 Ch. Div. 604.

(c) *Bozon v. Bolland*, 4 My. & Cr. 358; *In re Messenger, ex parte Calvert*, L. R. 3 Ch. Div. 317; *In re Snell*, L. R. 6 Ch. Div. 105; *In re Mason v. Taylor*, 10 Ch. Div. 729; and see *Newington Local Board v. Eldridge*, 12 Ch. Div. 349.

(d) *Ex parte Fuller, in re Long*, 16 Ch. Div. 617.

On fund  
realised in a  
suit.

On the other hand, the solicitor's lien upon a fund realised in a suit for his costs of the suit, or immediately connected with it—a lien which (as we have said) he may actively enforce (e),—is the creation of the statute law, the 23 & 24 Vict., c. 127, s. 28, having enacted that it shall be lawful for the court or judge before whom any suit or matter has been heard (f), to declare that the solicitor employed therein is entitled to a charge upon the property recovered or preserved by his instrumentality in such suit or matter. A solicitor may even be entitled to both these liens at once (g), and the lien extends usually to the entire fund, not merely to the particular share of his own client therein (h). Also, the town agent of a country solicitor having a lien against such country solicitor, who in turn has a lien against the country client upon a fund recovered, may exercise against the country client to the extent of the country solicitor's lien against such client, but not further,—his, the town agent's, own lien against the country solicitor (i).

Lien only  
commensurate  
with client's  
right at the  
time of the  
deposit.

It is quite settled that the solicitor's lien on papers exists only as against the client and the representatives of the client; also, that such lien is only commensurate with the right which the client had at the time of the deposit, and is therefore subject to the prior then existing rights of third persons, so that a prior incumbrancer is not prejudiced by it (j). And just as the solicitor's lien will not prejudice any prior

(e) 2 Sp. 802; *Smith's Man.* 342; *Verity v. Wyld*, 4 Drew. 427; *Haymes v. Cooper*, 33 Beav. 431; *Shaw v. Neal*, 6 W. R. 635.

(f) *Higgs v. Schrader*, 3 C. P. D. 252; *Owen v. Henshaw*, 7 Ch. Div. 385; *Brown v. Trotman*, 12 Ch. Div. 880; *Clover v. Adams*, 6 Q. B. D. 622.

(g) *Pilcher v. Arden*, in *re Brook*, 7 Ch. Div. 318.

(h) *Bulley v. Bulley*, 8 Ch. Div. 479; *Lawrence v. Fletcher*, 12 Ch. Div. 858.

(i) *Ex parte Edwards*, 7 Q. B. D. 155; 8 Q. B. D. 262.

(j) *Blunden v. Desart*, 2 Dr. & Warr. 405; *Young v. English*, 7 Beav. 10; 2 Sp. 800, 801; *Francis v. Francis*, 5 De G. M. & G. 108; *Turner v. Lettis*, 7 De G. M. & G. 243; *Ex parte Harper*, in *re Pooley*, 20 Ch. Div. 685.

existing equity, so the solicitor's lien will not be prejudiced by an equity arising subsequently to the inchoation of the lien (*k*). And the like rule appears to extend also to a lien on a fund recovered; thus, it has been decided that the lien of a solicitor on a sum due or payable to his client prevents a set-off against a sum due from the client (*l*).

A banker also has a lien on the securities deposited by a customer for the customer's general balance of account, and this right subsists where not inconsistent with the terms of a special contract for a specific security (*m*). Banker's lien.

Rights in equity equivalent to liens may also arise under various circumstances. Thus real or personal estate may be charged by an agreement, express or implied, creating a trust, which equity will enforce, both against the person creating the lien, and against others claiming, as volunteers, or with notice, under him. Under this head will fall the cases of legacies and portions charged on land. Quasi-liens.  
As where a charge in the nature of a trust.

It has been held that, where a man agrees to sell his estate, and to lend money to the purchaser for improving the estate, he will have a lien for the advances so made, as well as for the purchase-money (*n*). Vendor's lien for advances for improvements.

So also when there has been a breach of trust, and any *cestui que trust* is implicated therein and liable therefor, his interests in other parts of the trust funds Lien on interests of cestuis que trustent, for their breach of trust.

(*k*) *Faithfull v. Ewen*, 7 Ch. Div. 495; *Moet v. Pickering*, 8 Ch. Div. 372; *Shippey v. Grey*, W. N. 1880, p. 99; and distinguish *Pringle v. Gloag*, 10 Ch. Div. 676; *Hamer v. Giles*, 11 Ch. Div. 942; *Ex parte Griffin*, in *re Adams*, 14 Ch. Div. 37.

(*l*) *Ex parte Clelland*, L. R. 2 Ch. App. 808; *Ex parte Smith*, L. R. 3 Ch. App. 125; and see especially *Hamer v. Giles*, 11 Ch. Div. 942; and *Haymes v. Cooper*, 33 Beav. 431.

(*m*) *In re European Bank*, L. R. 8 Ch. App. 41.

(*n*) *Ex parte Linden*, 1 Mont. D. & D. 435; 2 Sp. 803.

are subject to a lien to the extent of the loss to the trust estate, which loss may accordingly be made good thereout (o).

Joint-tenant's  
lien for costs  
of renewing  
lease.

If one of two joint-tenants of a lease renew for the benefit of both, he will have a lien on the moiety of the other joint-tenant for a moiety of the fines and expenses (p).

No lien where  
two purchase  
and one pays  
the money.

But it seems that where two or more purchase an estate, and one pays the money, and the estate is conveyed to them both, the one who pays the money gains neither a lien nor a mortgage, because there is no contract for either; he has a right of action only (q). So also if one of two joint lessees and occupiers of a house redecorates it at his own expense in the first instance, he has no lien in respect thereof (r), and in such a case he may have no action or remedy at all.

X

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(o) *Hallett v. Hallett*, 13 Ch. Div. 232; and compare *Mycock v. Beatson*, 13 Ch. Div. 384.

(p) *Ex parte Grace*, 1 B. & P. 376.

(q) 2 Sp. 803.

(r) *Kay v. Johnson*, 21 Beav. 536; and see *Saunders v. Dunman*, 7 Ch. Div. 825.

## CHAPTER XX.

## PENALTIES AND FORFEITURES.

THE doctrine of equity with regard to penalties and forfeitures may be stated in the following words:—  
 Whenever a penalty or a forfeiture is inserted merely to secure the performance of some act or the enjoyment of some right or benefit, equity regards the performance of such act or the enjoyment of such right or benefit as the substantial and principal intent of the instrument, and the penalty <sup>of</sup> forfeiture as only accessory, and will therefore relieve against the penalty or forfeiture by simply decreeing a compensation in lieu of the same, proportionate to the damage really sustained (a). The penal sum is usually double the amount of the debt, and the obligee never recovers on account of principal, interest, and costs, or damages more than the amount of the penalty, and usually much less.

Doctrines.  
Penalty, &c., deemed accessory.  
Compensation decreed.

In all these cases, the general test by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can or cannot be made. If compensation can be made, then if the penalty is to secure the mere payment of money, courts of equity will relieve the party upon his paying the principal and interest (b). And if the penalty is to secure the performance of some collateral act or undertaking, the court will ascertain the amount of damages and grant relief on payment thereof (c).

Can compensation be made?  
If it can, equity relieves.

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(a) *Sloman v. Walter*, 2 L. C. 1112.

(b) *Elliott v. Turner*, 13 Sim. 477.

(c) *Daniell's Ch. Pr.* 1510-1512.



Party cannot avoid the contract by paying the penalty.

Although equity will generally relieve against a penalty, where it is only intended to secure the performance of a contract; on the other hand, it will not permit the party bound by the agreement to avoid that agreement by paying the stipulated penalty. "The general rule of equity," observes Lord St. Leonards, in *French v. Macale* (d), "is, that if a thing be agreed to be done, though there is a penalty annexed to its performance, yet the very thing itself must be done" (e).

*French v. Macale*.—Where covenantor may do either of two things, paying higher for one alternative than the other, that is not a case of penalty.

Where, however, upon the construction of the contract, the real intent of the contract is that a covenantor should have either of two alternative modes of user at his option,—that if he elects to adopt one of those alternatives, he is to pay a certain sum of money, but that, if he chooses to adopt the other alternative, he is to pay an additional sum of money,—in such a case, equity will look upon the additional payment, not as a penalty, but as liquidated damages fixed on by the parties, and will not relieve the covenantor from payment of the additional sum agreed upon, in case he should do such latter alternative act. This distinction is taken by Lord St. Leonards in the case of *French v. Macale* (f), where he lays down the law as follows:—"If a man covenant to abstain from doing a certain act, and agree that if he do it he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act; he cannot elect to break his engagement by paying for his violation of the contract. . . . The question for the court to ascertain is, whether the party is restricted by covenant from doing the particular act, although, if he do it, a payment is reserved; or whether, according to the true construction of the contract, its meaning is, that the one party shall have

(d) 2 Drew. & War. 274; and disting. *Weston v. Metropolitan Asylum District*, 8 Q. B. D. 387; and on app. 9 Q. B. D. 404.

(e) *Howard v. Hopkyns*, 2 Atk. 370.

(f) *Ubi supra*. See also *Parfit v. Chambre*, L. R. 15 Eq. 36.

a right to do the act on payment of what is agreed upon as an equivalent. If a man let meadow-land for two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, no doubt this is a perfectly good and unobjectionable contract; the breaking-up the land is not inconsistent with the contract, which provides that in case the act is done the landlord is to receive an increased rent." Lord Rosslyn said of such a case as that (g), "that it was the demise of land to a lessee, to do with it as he thought proper; but if he used it in one way, he was to pay one rent, and if in another, another; that is a different case from an agreement not to do a thing, with a penalty for doing it" (h).

Having premised the above general remarks, it is proposed to lay down a few rules which may aid the student in arriving at a solution of the question whether a sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty, or as liquidated and ascertained damages:—

1. Where the payment of a smaller sum is secured by a larger, the sum agreed for must always be considered as a penalty (i).

Rules as to distinction between a penalty and liquidated damages.

1. Smaller sum secured by larger.

2. Where a deed contains covenants, or an agreement contains provisions, for the performance of several acts, and then a sum is stated at the end to be paid upon the breach of *any* or of *all* such stipulations, and that sum will be in some instances too large, and in others too small a compensation for the injury occasioned, that sum is to be considered as a penalty.

2. Covenant to do several things, and one sum for breach of *any* or *all*.

(g) *Hardy v. Martin*, 1 Cox. 27.

(h) *Herbert v. Salisbury & Yeovil Railway Company*, L. R. 2 Eq. 221.

(i) *Astley v. Weldon*, 2 B. & P. 350-354; *Aylet v. Dodd*, 2 Atk. 239; and disting. *Protector Endowment Co. v. Grice*, 5 Q. B. D. 121; on appeal, 5 Q. B. D. 592.

*Kemble v. Farren*,—a case in which penal sum was declared not penal but liquidated, and yet court relieved.

Thus, in *Kemble v. Farren* (j), the defendant had engaged to act as principal comedian at Covent Garden for four seasons, conforming in all things to the rules of the theatre. The plaintiff was to pay the defendant £3, 6s. 8d. every night the theatre was open, with other terms. The agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, *or any part thereof*, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by such omission should amount, and which sum was thereby declared by the parties *to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof*. The breach alleged was, that the defendant refused to act during the second season. Notwithstanding these sweeping words, the court decided that the sum must be taken to be a penalty, as it was not limited to those breaches which were of an uncertain nature and amount. And Tindal, C.J., said, "that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty, appears to be a contradiction in terms" (k).

3. Where amount of injury cannot be measured.

3. On the other hand, if there be a contract consisting of one or more stipulations, the damages from the breach of which cannot be measured, then the contract must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty (l).

4. There never was any doubt that if there be only

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(j) 6 Bing. 141.

(k) Mayne on Dam., 3d ed., 192; *Davies v. Penton*, 6 B. & C. 223; *Horner v. Flintoff*, 9 M. & W. 681; 3 Byth. & Jarin. Conv. by Sweet. 325; *Dimech v. Corlet*, 12 Moo. P. C. C. 199.

(l) Mayne on Dam., 3d ed., 129; *Atkins v. Kinnier*, 4 Exch. 776-783; *Galsworthy v. Strutt*, 1 Exch. 659.

one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation in order to avoid the difficulty (*m*).

5. The mere use of the term "penalty," or "liquidated damages," does not determine the intention of the parties that the sum stipulated should really be what it is said to be; but it is like any other question of construction, to be determined by the nature of the provisions, and the language of the whole instrument (*n*).

6. Where the expressions are doubtful or contradictory, the court, it seems, will lean in favour of the construction which treats the sum named as a penalty only, and not as fixing the measure of the damages, such construction being most consonant with justice (*o*). But the mere largeness of the amount fixed will not *per se* be sufficient reason for holding it to be a penalty (*p*).

The same general principles which apply to equitable relief against penalties govern the courts of equity in relieving against forfeitures,—at least in cases other than those arising under leases and other strict contracts (*q*). And even in the case of leases, equity would interfere to a limited extent to relieve against a forfeiture. Thus, equity would relieve against the forfeiture

(*m*) *Sainter v. Ferguson*, 7 C. B. 730; *Sparrow v. Paris*, 8 Jur. N.S. 391; Byth. & Jarm. Conv. by Sweet, 326; Mayne on Dam., 3d ed., 130.

(*n*) *Dimech v. Corlett*, 12 Moo. P. C. C. 199; *Green v. Price*, 13 M. & W. 701; 16 M. & W. 346; *Jones v. Green*, 3 You. & J. 304.

(*o*) *Davies v. Penton*, 6 B. & C. 216.

(*p*) *Astley v. Weldon*, 2 B. & P. 351.

(*q*) *Cooper v. L. B. & S. C. Ry. Co.*, 4 Exch. Div. 88.

of a lease for non-payment of rent, on the lessee paying what was due (*r*),—that being a mere money demand.

Forfeiture  
for breach  
of covenant  
to repair.

It seems to have been not quite settled whether equity would (and the better opinion is that equity could not) relieve against a forfeiture arising from a breach of covenant to repair, or, in fact, any breach of covenant other than the breach of covenant to pay rent, unless under very special circumstances (*s*). Equity would, however, require the covenantee to be satisfied with a substantial performance on the part of the covenantor, where the nature of the covenant admitted of such performance. But if the contract were such that the court could not secure its substantial performance, or where it was of the very essence of the contract that it should be strictly performed (in which case the strict performance was matter of substance and not of form merely), equity would not relieve against a forfeiture for non-performance (*t*).

Breach of  
covenant to  
insure.

The courts of equity could not relieve a tenant from forfeiture for breach of a covenant to insure (*u*). Lord Eldon laid it down that the court would not relieve against breaches of covenant except, in cases where payment of money was a complete compensation. This rule having been found to operate very hardly on those few lessees who inadvertently and not wilfully neglected to insure, the Legislature stepped in and remedied it, but in the case of such inadvertent neglects only. Under 22 & 23 Vict., c. 35,

(*r*) Freem. Ch. Rep. 114. The Common Law courts might also have relieved in such a case, 15 & 16 Vict., c. 76, ss. 210-212; 23 & 24 Vict., c. 126, s. 1; *Bowser v. Colby*, 1 Hare, 126.

(*s*) *Hill v. Barclay*, 18 Ves. 62.

(*t*) *Hill v. Barclay*, 16 Ves. 402; 18 Ves. 62; *Gregory v. Wilson*, 9 Hare, 683; *Nokes v. Gibbon*, 3 Drew. 681; *Bamford v. Creasy*, 3 Giff. 675; *Croft v. Goldsmid*, 24 Beav. 312.

(*u*) *Green v. Bridges*, 4 Sim. 96.

s. 4, the court of equity was enabled to relieve against a forfeiture for non-insurance, but only upon a full compliance with the particulars in the Act expressed, and which were,—that no damage from fire should, in the meantime, have happened, and that the inadvertence had been purged by the effecting of a proper fire insurance before coming for relief (v). And similar jurisdiction was conferred upon the courts of common law by the Common Law Procedure Act of 1860 (w). And more recently, by the Conveyancing Act, 1881 (44 & 45 Vict., c. 41), s. 14, the High Court is enabled to give relief upon equitable terms (to be prescribed by the court), against every forfeiture for breach of any covenant whatsoever contained in a lease or underlease or fee-farm grant, other than and except only the following covenants and conditions, namely,—(1.) The covenant not to assign or underlet; (2.) The condition of forfeiture upon a bankruptcy or execution; and (3.) The covenant in a mining lease for permitting inspection, &c., by the lessor. And the Conveyancing Act, 1881, having provided these very large powers of relief, has naturally superseded the relief under the two previous statutes in that behalf, which it has (so far as regards such relief) also expressly repealed.

Relief under  
the Conveyancing  
Act, 1881.

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(v) *Page v. Bennett*, 2 Giff. 117.

(w) 23 & 24 Vict., c. 126, ss. 2, 3.

## CHAPTER XXI.

## MARRIED WOMEN.

## SECT. I.—SEPARATE ESTATE.

Sub-sect. 1.—*Apart from Legislation.*Sub-sect. 2.—*The Effects of Recent Legislation.*

## SECT. II.—PIN-MONEY AND PARAPHERNALIA.

SECT. III.—EQUITY TO A SETTLEMENT AND RIGHT OF SURVIVORSHIP.

SECT. IV.—SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS.

IN no respect did the rules of equity show a more complete divergence from those of the old common law than on the subject of the rights and liabilities of married women.

Rights of  
feme covert at  
common law.

By the old common law the husband on marrying became, and (subject to the legislative alterations of that law which are hereinafter mentioned) still becomes, entitled to receive the rents and profits of the wife's real estates during the joint lives (a); and he became, and (subject as aforesaid) still becomes, absolutely entitled to all her chattels personal in possession (b), and to her choses in action upon reducing them into possession during the coverture (c); or if he did not, but survived her, he (d), and after his death his administrator (e), on taking out administration to the wife, was, and (subject as aforesaid) still is, entitled to recover. He also became, and (subject as aforesaid) still becomes, entitled *jure mariti* to her legal chattels

The husband  
took all her  
property, as a  
general rule. 3

(a) *Polyblank v. Hawkins*, Doug. 329; *Moore v. Vinten*, 12 Sim. 161.

(b) Co. Litt. 300 a.

(c) *Scaven v. Blunt*, 7 Ves. 294; *Wildman v. Wildman*, 9 Ves. 174; Co. Litt. 351.

(d) *Betts v. Kimpton*, 2 B. & Ad. 277; *Proudley v. Fielder*, 2 My. & K. 57.

(e) *In the goods of Harding*, L. R. 2 P. & D. 394; *Fleet v. Perrins*, L. R. 3 Q. B. 536; *Re Wensley*, 7 P. D. 13.

real, *i.e.*, leaseholds, with full power to aliene them even though reversionary (*f*); though, if he died before his wife without having reduced into possession her choses in action (*g*), or without having aliened her chattels real (*h*), they survived to her.

The husband acquired this interest in the property of his wife in consideration of the obligation which upon marriage he contracted of maintaining her; but the old courts of common law gave the wife no remedy whatever in case of the husband's refusing or neglecting to fulfil the duties cast upon him by the marriage, or in the case of the husband's bankruptcy or insolvency; so that a married woman might have been left utterly destitute, no matter how large a fortune she might have brought to her husband on her marriage; and it was therefore that equity raised up, with reference to married women, a system founded on justice and right, and utterly in contravention of the doctrines of the old common law; and so beneficial was the equitable jurisdiction found by experience to be, and so much in harmony with the requirements of modern society, that it received at length legislative sanction by the Married Women's Property Act, 1870, amended by the Married Women's Property Act, 1874, both which acts have since been consolidated and amended by the Married Women's Property Act, 1882, hereinafter more particularly stated.

In consideration of maintaining her; her. Wife remediless at common law.

Interference of equity.

Married Women's Property Act, 1882 (45 & 46 Vict., c. 75).

It is proposed, firstly, to consider the original jurisdiction of the old Court of Chancery, and now of the High Court of Justice in its Chancery Division or on its equitable side, regarding married women, which still continues in its entirety, though with a scope widened

Protective jurisdiction of Court of Chancery.

(*f*) *Donne v. Hart*, 2 Russ. & My. 363; *Bales v. Dandy*, 2 Atk. 207; 3 Russ. 72 n.

(*g*) Co. Litt. 351 b.

(*h*) *Ibid.*



in a great many instances by the recent legislation, and then afterwards to explain the effect of such recent legislation, but occasionally the effect of such recent legislation will be most conveniently stated incidentally in considering the original jurisdiction.

## SECTION I.—THE WIFE'S SEPARATE ESTATE.

### SUB-SECT. 1.—*Apart from Legislation.*

*Feme covert* could not at common law hold property apart from her husband; but she might do so in equity.

At common law the separate existence of the wife was not, as a general rule, known or contemplated, being considered as merged by the coverture in that of her husband (i); she was not permitted to take or enjoy any real or personal estate separate from and independently of her husband. But in equity, whose creature the wife's separate estate was and is (j), the case was and is widely different; for there a married woman was and is considered capable of possessing property to her own use, independently of her husband; and upon once being permitted to hold property to her separate use as a *feme sole*, she took and takes it with all its privileges and incidents, including the *jus disponendi* (k).

Separate estate, how created.

The wife's separate estate (even apart from the recent legislation) may be created out of any species of property, and in many modes, but principally the following:—

1. By ante-nuptial agreement.

1. The wife may hold separate estate by an ante-nuptial written agreement with the intended husband for that purpose, and such ante-nuptial agreement

(i) *Murray v. Barlee*, 3 My. & K. 220.

(j) *Brandon v. Robinson*, 18 Ves. 434.

(k) *Fettiplace v. Gorges*, 1 Ves. Jr. 48.

may be made with reference either to her own property, or to the property of her husband, or of third parties (*l*).

2. By special agreement with the husband after marriage in certain cases (*m*), or where the husband deserts her, and this independently of and long prior to the statute 20 & 21 Vict., c. 85 (*n*). And the separate estate may arise even under a private Act of Parliament (*o*). 2. By special post-nuptial agreement, or where he deserts her.

3. Gifts also from the husband to the wife may be made to her separate use, where they are made to her absolutely, and not merely to be worn as ornaments of her person (*p*). 3. By gifts to wife absolutely from husband.

4. It seems also that a gift from a stranger by delivery merely to the wife during her coverture, even though not expressed to be for her separate use, would be for her separate use (*q*). 4. By gifts to her from a stranger during coverture.

5. A wife trading separately is entitled to the trade property as her separate estate (*r*). 5. Wife trading separately.

6. The wife will, of course, hold all such property to her separate use as has been expressly limited to her by devise or otherwise for that purpose, whether 6. By express limitation for that purpose.

(*l*) *Simmons v. Simmons*, 6 Hare, 352; *Tullett v. Armstrong*, 1 Beav. 21.

(*m*) *Haddon v. Fladgate*, 1 Swab. & Tr. 48; *Pride v. Budd*, L. R. 7 Ch. App. 64; *Ashworth v. Outram*, L. R. 5 Ch. Div. 923.

(*n*) *Cecil v. Juxon*, 1 Atk. 278; *Re Pope's Trusts*, 21 W. R. 646; 2 Bright's Husb. and Wife, 299; and see *In re Rainsdon's Trusts*, 4 Drew. 446; *Rudge v. Weedon*, 4 De G. & Jo. 216, 223; *Nicholson v. Drury Buildings*, 7 Ch. Div. 48.

(*o*) *In re Peacock's Trusts*, 10 Ch. Div. 490.

(*p*) *Graham v. Londonderry*, 3 Atk. 393; *Grant v. Grant*, 13 W. R. 1057; *Mews v. Mews*, 15 Beav. 529; *Baddeley v. Baddeley*, 9 Ch. Div. 113.

(*q*) *Graham v. Londonderry*, 3 Atk. 393; 1 Bright's Husb. and Wife, 289.

(*r*) *Ex parte Shepherd*, in *re Shepherd*, 10 Ch. Div. 573

before or after coverture; and this is probably the most frequent source of the separate estate of married women, apart of course from the recent legislation.

Interposition  
of trustees  
not necessary.

It was formerly supposed that the interposition of trustees in all arrangements of this sort, whether made before or after marriage, was indispensable for the protection of the wife's interests; in other words, that the property of which the wife was to have the separate use should be vested in trustees for her benefit; and that the agreement of the husband should be made with such trustees. But although in strict propriety that should always be done, yet it was afterwards established that the intervention of trustees was not indispensable; and that whenever real or personal property was devised to, or otherwise given to or settled upon, a married woman, either before or after marriage, for her separate use, without the intervention of trustees, the intention of the parties would be effectuated in equity, and the wife's interest protected against the rights and claims of her husband and of his creditors (s); and in such a case the husband as having the legal estate, would be held a trustee for her (t). And under the Married Women's Property Act, 1882 (u), it is expressly provided that the intervention of a trustee or trustees shall not be necessary.

Husband a  
trustee for  
wife.

What words  
held sufficient  
to create a  
separate use.

No particular form of words was or is necessary in order to vest property in a married woman for her separate use; the marital rights of the husband will be defeated if there is a gift or settlement of property to his wife or to trustees for her, *e.g.*, for her "sole and separate use" (v), "for her own use, and at her own

(s) *Newlands v. Paynter*, 4 My. & Cr. 408; *Fox v. Hawks*, 13 Ch. Div. 822.

(t) *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockell*, 9 Ves. 375; St. 1380.

(u) 45 & 46 Vict., c. 75, sect. 1. sub-sect. 1.

(v) *Parker v. Brooke*, 9 Ves. 583.

2 disposal" (w), "for her own use, independent of her  
 3 husband" (x), "for her own use and benefit, independent of any other person" (y), "that she should receive  
 4 and enjoy the issue and profits" (z); and on the other  
 5 hand, no separate use would be created where there was, e.g., a mere direction, "to pay to a married woman and her assigns" (a), or where there was a gift "to her own use and benefit" (b), or to her "absolute use" (c), or when payment was directed to be made "into her own proper hands, to and for her own use and benefit" (d), or when property was given "to be under her sole control" (e).

What words held not sufficient for that purpose.

The rule was laid down in *Peacock v. Monk* (f), that a *feme covert* acting with respect to her separate property was competent to act in all respects as if she were a *feme sole* (g); but of course where the restriction on anticipation was annexed to the separate use, this power of disposition was taken away. And in accordance with this rule it was decided,—

The wife's power of disposition over separate estate.

(a.) That personal property settled upon a *feme covert* for her separate use was subject to all the incidents of property vested in persons *sui juris*, and that the *feme* might dispose of it without her husband's consent, either by act *inter vivos* (h), or by will (i),

(a.) As to personality.

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- (w) *Inglefield v. Coghlan*, 2 Coll. 247.  
 (x) *Wagstaff v. Smith*, 9 Ves. 520.  
 (y) *Glover v. Hall*, 16 Sim. 568.  
 (z) *Tyrrell v. Hope*, 2 Atk. 558; and see *Gilbert v. Lewis*, 1 De G. Jo. & Sm. 38; *In re Tarsey's Trusts*, 1 L. R. Eq. 561.  
 (a) *Lumb v. Milnes*, 5 Ves. 517.  
 (b) *Kensington v. Dollond*, 2 My. & K. 184.  
 (c) *Ex parte Abbot*, 1 Deacon, 338.  
 (d) *Tyler v. Lake*, 2 Russ. & My. 183.  
 (e) *Massey v. Parker*, 2 My. & K. 174.  
 (f) 2 Ves. 190.  
 (g) *Hulme v. Tenant*, 1 L. C. 521.  
 (h) *Wagstaff v. Smith*, 9 Ves. 520.  
 (i) *Fettiplace v. Gorges*, 3 Bro. C. C. 8; *In the goods of Smith*, 1 Sw. & Tr. 125.

and this power extended to interests in reversion, as well as to interests in possession (j); also,—

(b.) As to  
realty.

1. Life estate.

2. Fee-simple  
estates.

(b.) That as to real estate settled to the separate use of a married woman, she had the same power over her *life-interest* therein as she would have had as a *feme sole*, and that a contract to sell or mortgage that interest would have been specifically enforced against her (k); and as regards her *fee-simple* or *fee-tail* estates, that while she could not dispose of the *legal* estate without the concurrence of the person or persons in whom that estate was vested (viz., of her husband or of her other trustees, as the case might be), she might dispose of the *equitable* estate either by will or by an instrument *inter vivos*, and without the concurrence of her husband (l), and that whether trustees were interposed or not (m); but whether such disposition of her fee estates by deed or by will would deprive the husband surviving her of his curtesy estate, assuming that he would otherwise be entitled thereto, the rule of the court appears to have been very undecided, but the matter seems now to be fully settled; for although, in the absence of, or subject to, any such disposition by the wife, the husband is entitled to his curtesy, yet in case the wife disposes of the whole estate by deed *inter vivos*, or even by will, the husband is by such disposition wholly barred and excluded from his estate by the curtesy (n).

Upon the principle that a married woman as to

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(j) *Sturgis v. Corp.*, 13 Ves. 190; *Leckmere v. Broderidge*, 32 Beav. 353.

(k) *Stead v. Nelson*, 2 Beav. 245; *Major v. Lansley*, 2 Russ. & My. 357.

(l) *Taylor v. Meads*, 34 L. J. Ch. 203; *Pride v. Bubb*, L. R. 7 Ch. App. 64.

(m) *Hall v. Waterhouse*, 13 W. R. 633; and see *Essex v. Atkins*, 14 Ves. 542; *Hodgson v. Hodgson*, 2 Kee. 704.

(n) *Roberts v. Dixwell*, 1 Atk. 607; *Morgan v. Morgan*, 5 Madd. 408; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Cooper v. M'Donald*, L. R. 7 Ch. Div. 288.

her separate property is to be deemed a *feme sole*, she would render it liable by concurring with her trustees in a breach of trust (*o*), or by herself committing a breach of trust in respect of other property under the trust (*p*), unless she was restrained from anticipation (*q*). And under the Married Women's Property Act, 1882 (*r*), a married women is now rendered liable for any breach of trust or devastavit committed by her either before or after her marriage, and this liability is to be regarded as a liability arising upon a *contract* by her within the meaning of the Act.

Separate property liable for her breach of trust, except restrained from anticipation.

If the wife, having property settled to her separate use, effected savings out of it, she had the same power and control over those savings as she had over the separate estate itself; for, in the quaint language of Lord Keeper Cowper, "the sprout was to savour of the root and to go the same way" (*s*); and if the wife had a power over the capital, she had also a power over the income and accumulations (*t*); and the same rule applied to savings out of the income allowed to a married woman upon her husband's lunacy (*u*); and even the investments made with such savings or with the accumulations thereof belonged to the married woman for her separate use (*v*), a result which, however, did not hold good in all cases for the investments of the *capital* moneys of the separate estate (*w*); but now, under the Married Women's

The savings of income of separate estate are also separate estate.

(*o*) *Brewer v. Swirles*, 2 Sm. & Giff. 219; *Jones v. Higgins*, L. R. 2 Eq. 538.

(*p*) *Clive v. Carew*, 1 J. & H. 199.

(*q*) *Davies v. Hodgson*, 25 Beav. 186; *Pemberton v. M'Gill*, 1 Drew. & Sm. 266; *Stanley v. Stanley*, 26 W. R. 310; 7 Ch. Div. 589.

(*r*) 45 & 46 Vict., c. 75, s. 24.

(*s*) *Gore v. Knight*, 2 Vern. 535.

(*t*) *Newlands v. Paynter*, 4 My. & Cr. 408; *Humphrey v. Richards*, 2 Jur. N.S. 432.

(*u*) *Re Sharp*, 3 Pub. Div. 76.

(*v*) *Barrack v. M'Culloch*, 3 Kay & J. 110.

(*w*) *Wright v. Wright*, 2 J. & H. 647, stated *infra* in this section.

Property Act, 1882 (x), the investments of such capital moneys would also be, and remain in all cases, separate estate.

She may permit her husband to receive the income of her separate estate, even though restrained from anticipation.

In any case, she is entitled to only one year's account.

Husband takes separate personal estate undisposed of.

*Jure mariti.*

Or as her administrator.

"A wife having property settled for her separate use was entitled to deal with the money as she pleased. If she directly authorised the money to be paid to her husband, he was entitled to receive it, and she could never recall it. . . . If the husband and wife, living together, had for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband, to be used by him (of course for their joint purposes), that would have amounted to evidence of a direction on her part that the separate income, which she otherwise would be entitled to, should be received by him" (y); and even in cases where she was entitled to an account against him for such receipts, the general rule was that he should be obliged to account for one year's receipts only (z). Also, if a *feme covert*, having personal estate settled to her separate use, died without disposing of it, the husband was entitled to it; and all those parts thereof that consisted of cash, furniture, or other personal chattels, or of chattels real (a), he took in his marital right (b), and all such parts thereof as consisted of "choses in action," he was entitled to take as her administrator (c), and in either case for his, the husband's, own benefit, but subject to his wife's debts; and this is still the law under the Married Women's Property Act, 1882 (d).

(x) 45 & 46 Vict., c. 75, ss. 6, 7, 8.

(y) *Caton v. Rideout*, 1 Mac. & G. 601; *Rowley v. Unwin*, 2 K. & J. 138; *Dixon v. Dixon*, 9 Ch. Div. 587.

(z) *Lewin Tr.* 549; *Peachey on Settlements*, 291; but see *Darkin v. Darkin*, 17 Beav. 578.

(a) Co. Litt. 46 b.; *Dyer*, 251.

(b) *Molony v. Kennedy*, 10 Sim. 254; *Johnstone v. Lumb*, 15 Sim. 308.

(c) *Proudley v. Fielder*, 2 My. & K. 57.

(d) 45 & 46 Vict., c. 75, ss. 1, 4, 23; and distinguish s. 11.

Although a man having a general power of appointment over property, which in default of appointment goes to others, by exercising his power makes the appointed property assets for payment of his debts, in an administration of his estate after his death (e), yet it was held, that if a married woman exercised such a power, the appointed property would not have been applicable to the payment of her debts in such an administration of her estate; but now, under the Married Women's Property Act, 1882 (f), the appointed property would be assets in such administration.

Property subject to a general power of appointment.

The reason for the old rule of equity in this respect was to be found in certain differences between property being separate property on the one hand, and powers of appointment on the other hand. Thus, the separate property of a married woman was never recognised by the old common law, while her capacity to exercise a power of appointment was there fully recognised. And again, it was long held in equity that although a *feme covert* having separate estate might contract by express agreement a debt payable out of that property, yet she could not by mere contract incur a debt payable out of property over which she had a mere power of appointment (g); and it was only latterly decided that a married woman committing a fraud was liable to be visited with the consequences of such fraud (h); *scil.* that by the fraud she rendered her general property liable, and if that was insufficient, then the appointed fund also (i); and in the comparatively recent case of *The London Chartered Bank of Australia v. Lempriere* (j), in the Privy Council, although the

Differences between separate estate and power of appointment.

(e) *Jenny v. Andrews*, 6 Mad. 264. (f) 45 & 46 Vict., c. 75, s. 4.

(g) *Shattock v. Shattock*, L. R. 2 Eq. 186.

(h) *Savage v. Foster*, 9 Mod. 35; *Blain v. Terryberry*, 11 Gr. 286.

(i) *Vaughan v. Vanderstegen*, 2 Drew. 165, 363; *Shattock v. Shattock*, L. R. 2 Eq. 182.

(j) R. L. 4 P. C. 572; *Godfrey v. Harben*, 13 Ch. Div. 216; *Herring v. Barrow*, 13 Ch. Div. 144. And see *Heatley v. Thomas*, 15 Ves. 596.



distinction between separate property and a general power of appointment was not (as it could not be) exploded for all purposes, still the distinction was practically exploded by an ingenious evasion. In that case, a Mrs. A. was entitled to large personal estate, settled to her separate use, with remainder as she should by will or deed appoint, and *she was not restrained from anticipation*. At the request of her bankers she gave them a letter charging her interest under the settlement as a security for overdrafts, and subsequently made her will in execution of the power, and died largely indebted. The action was thereupon instituted to effectuate the charge; and although it was contended that the corpus could not be made liable, James, L.J., said: "In the present case it is to be noted that the gift is to the married woman for her separate use for life, with remainder as she should, notwithstanding her coverture, by deed or will appoint, *with remainder to her executors or administrators*. Their Lordships are satisfied that on the weight of authority and on principle they ought to treat this as what it is in common sense, and to common apprehension it would be, *an absolute gift to the sole and separate use of the lady*. The words are an expansion and expression of what would be implied in the words *sole and separate use*; and their Lordships conceive themselves at liberty to hold that such a form of gift to a married woman, *without any restriction on anticipation*, vests in equity the entire corpus in her for all purposes, as fully as a similar gift to a man would vest it in him."

A *feme sole* could not originally bind her separate estate with debts. Successive relaxations of this rule.

Courts of equity were also very slow to admit that a married woman having separate property could bind that property even with any liability for her debts; but after a time, being pressed by the injustice of allowing her to continue in the enjoyment of her separate property without paying her creditors, the courts, at first,

ventured so far as to hold, that if she made a contract for payment of money by a written instrument, with a certain degree of formality and solemnity, as by a bond under her hand and seal (*k*), in that case, the property settled to her separate use should be made liable to the payment of it; and this principle was subsequently extended to instruments of a less formal character, such as to bills of exchange (*l*), or promissory-notes (*m*), and ultimately to any written agreement (*n*). But courts of equity still for a long time refused to extend it to a verbal agreement or other common assumpsit; for it was said the married woman's disposition of her separate estate was in reality the execution of a power of appointment, and only an instrument in writing would operate as an execution of the power, and a mere assumpsit would not do (*o*); or if the married woman's disposition was not (and it was not in reality) like the execution of a power of appointment, at all events in order specifically to charge her separate estate, the execution by her of a written instrument was deemed indispensable to show her intention to create such a charge (*p*); and it was only by means of a charge (*q*), and in fact it still is only by means of a charge, that the married woman's property can be rendered liable to satisfy her debts (*r*). However, latterly the courts felt themselves pressed with the inconsistency of drawing this distinction between the written and the verbal engagements of a married woman, and a growing tendency was manifested to adopt a more consistent course

(*r*) Her separate estate was bound by an instrument under seal.

(*o*) By bill or note.

(*n*) By ordinary written agreement.

(*l*) And last of all, after a final struggle, by her ordinary parol or simple contracts.

Courts now hold that to the same extent that she is regarded as a *feme sole* she may contract debts.

(*k*) *Hulme v. Tenant*, 1 L. C. 525; *Heatley v. Thomas*, 15 Ves. 596.

(*l*) *Stuart v. Kirkwall*, 3 Mad. 387; *Owen v. Homan*, 4 H. L. Cas. 997; *M'Henry v. Davies*, L. R. 10 Eq. 88.

(*m*) *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Soule*, 4 Russ. 112.

(*n*) *Master v. Fuller*, 1 Ves. Jr. 513; *Murray v. Barlee*, 3 My. & K. 209; *Picard v. Hine*, L. R. 5 Ch. App. 274.

(*o*) *Murray v. Barlee*, 3 My. & K. 223; *Owens v. Dickenson*, 1 Cr. & Ph. 53.

(*p*) *Murray v. Barlee*, 3 My. & K. 223.

(*q*) *Hodgson v. Williamson*, 15 Ch. Div. 87; *Robinson v. Pickering*, 16 Ch. Div. 660; *Durrant v. Reckitts*, 8 Q. B. D. 177.

(*r*) Married Women's Property Act 1882 (45 & 46 Vict., c. 75), ss. 1, 13, 15.

Her verbal engagements now binding on her separate estate.

by holding, 1st, That to the same extent to which a married woman was by courts of equity constituted a *feme sole* with respect to property, she ought also to be regarded as a *feme sole* with respect to her debts, or engagements in the nature of debts; and, 2d, That all such debts should stand on the same footing, in whatever form contracted (s). And at last the liability of the separate estate on merely verbal contracts was decided by Kindersley, V.C., who in *Matthewman's Case* (t), says: "It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal engagement, expressly making her estate liable, such contract would bind it; nor is it necessary that there should be an express reference made to the fact of there being such separate estate, for a bond or promissory-note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable (u), provided she be not restrained from anticipation (v). If the circumstances are such as to lead to the conclusion that she was contracting not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation."

The liability now extends to future property of *feme*.

But even after the rule had been thus extended in the last-mentioned case, the courts still evinced a great aversion to extending the liability of the separate estate of a married woman; and it was held, in fact, that her general engagements could be enforced only against so much of her separate estate as she was entitled to at the date of entering into the engage-

(s) *Faughan v. Vanderstegen*, 2 Drew. 182.

(t) L. R. 3 Eq. 787; see also *Mayd v. Field*, L. R. 3 Ch. Div. 587; *Davies v. Jenkins*, L. R. 6 Ch. Div. 728; *Collett v. Dickenson*, W. N. 1879, 80.

(u) L. J. Turner's remarks in *Johnson v. Gallagher*, 3 De G. F. & Jo. 494.

(v) *Atwood v. Chichester*, 3 Q. B. Div. 722.

ment, and as remained at the date of entering up judgment against it, and not against separate estate to which she became entitled after the date of entering into the engagement (*w*); but now, under the Married Women's Property Act, 1882 (*x*), the contracts of a married woman bind not only her then present, but also all future accruing, separate property.

It was not the practice of the court to make any personal decree against a married woman (*y*); therefore, no bankruptcy decree or order for her imprisonment under the Bankruptcy Act, 1869, or the Debtor's Act, 1869, could be made against her (*z*), even although she was engaged in trade and was trading separately from her husband. However, now, under the Married Women's Property Act, 1882 (*u*), a married woman carrying on a trade separately from her husband is, in respect of her separate property, made subject to the bankruptcy laws in the same way as if she were a *feme sole*.

No personal  
decree against  
a *feme covert*.

The extent of the relief afforded by equity against the separate estate of a *feme covert* was thus laid down by Lord Thurlow in *Hulme v. Tenant* (*b*): "Determined cases seem to go thus far, that the general engagement of the wife shall operate upon her *personal property*, shall apply to the *rents and profits of her real estate*. But I know of no case where the *general engagement* of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make convey-

General en-  
gagements  
bind the  
*corpus* of her  
*personalty*—  
rents and  
profits of her  
realty.

(*w*) *Pike v. Fitzgibbon*, *Martin v. Fitzgibbon*, 14 Ch. Div. 837; on app. 17 Ch. Div. 454; *Flower v. Buller*, 15 Ch. Div. 665; and see *Smith v. Lucas*, 18 Ch. Div. 531.

(*x*) 45 & 46 Vict., c. 75, s. 1, sub-sect. 4.

(*y*) *Francis v. Wigzell*, 1 Mad. 264.

(*z*) *Johnson v. Gallacher*, 30 L. J. Ch. 398; and especially *Ex parte Holland*, in *re Heneage*, L. R. 9 Ch. App. 307; *Ex parte Shepherd*, in *re Shepherd*, 10 Ch. Div. 573; *Ex parte Jones*, in *re Grissell*, 12 Ch. Div. 484.

(*u*) 45 & 46 Vict., c. 75, s. 1, sub-sect. 5.

(*b*) 1 L. C. 526.

Bill for administration of separate estate.

Restraint on anticipation,—origin of, and necessity for.

ance of that real estate, or shall by *sale, mortgage*, or otherwise, raise the money to satisfy that general engagement on the part of the wife" (c). But it is more than doubtful whether this statement of Lord Thurlow's adequately expressed the extent of the relief which was latterly afforded against the separate property of married women; for when the charge of debts against such property was declared, the courts would proceed to give directions as to the realisation of the charge; and they might apparently, in a proper case, have directed a sale or mortgage thereof, together with the necessary incidental conveyance. The Married Women's Property Act, 1882 (d), appears to be silent on the subject. Excepting through such declaration of charge and the realisation thereof in such manner as the court may direct, the creditors, *semble*, can have no execution against either the real or the personal estate of the married woman during her life; but after her death they may file a bill against her representatives for the administration of her separate estate, which will be treated as equitable assets (e).

It has been seen that when first property was permitted to be settled to the separate use of a married woman, equity viewed her as a *feme sole* to the extent of having dominion over the property. It was, however, soon found that this concession to the requirements of justice, though useful and operative in securing to her a dominion over the estate so devoted to her support, was open to the difficulty that she, being at liberty to dispose of it (as a *feme sole* might have disposed of it), was nevertheless left exposed to the persuasion or other mode of influence of her husband, which was often found to defeat the very purpose for

(c) *Francis v. Wigzell*, 1 Mad. 258; *Aylett v. Ashton*, 1 My. & Cr. 105, 112.

(d) 45 & 46 Vict., c. 75; but see ss. 20, 21; also *Williams v. Mercier*, 9 Q. B. D. 337.

(e) *Owens v. Dickenson*, 1 Cr. & Ph. 48; *Gregory v. Lockyer*, 6 Madd. 90. And see 45 & 46 Vict., c. 75, ss. 4, 23.

which her separate property was given her. To meet, therefore, this further difficulty, a provision was adopted of prohibiting the anticipation of the income, so that the wife should have no dominion over it till the payments actually became due (*f*). And this mode of settlement was supported on the following reasoning:—That separate estate is purely a creature of equity, devised for the protection of married women, and that being such, equity has a right to act upon its own creature, and to modify it so as to further the object for which separate estate was first created (*g*). It was for some time thought that a similar fetter might be imposed on property enjoyed by men, without relation to the married state, but Lord Eldon, in *Brandon v. Robinson* (*h*), decided that in the case of disposition to a man, the *jus disponendi* cannot be taken away from him by a mere prohibition against alienation. The fact is, that any such attempted restraint or alienation in the case of a man would be void for inconsistency or repugnancy; but *the restraint on anticipation is consistent with and in furtherance of the very object of the separate estate of a married woman*, and so can be (and has been) permitted to be good. But for this consistency of the two, equity could not have permitted the device of restraint to succeed; for, of course, equity cannot, any more than law, make valid what is void *in se* for repugnancy. Apparently, also, the restraint on anticipation is not within the rule of Perpetuities (*i*).

The power of courts of equity to impose restraints upon the alienation by married women of their separate property having been established, the question next arose as to whether these restraints were to be confined to an actually existing coverture, or might be

Restraint on anticipation,—operation of.

(*f*) *Pybus v. Smith*, 3 Bro. C. C. 339.

(*g*) *Tullett v. Armstrong*, 1 Beav. 22.

(*h*) 18 Ves. 429.

(*i*) *Buckton v. Hay*, 11 Ch. Div. 645; *Herbert v. Webster*, 15 Ch. Div. 610.

extended to take effect upon a future marriage. After some wavering of opinion, it was eventually determined in *Tullett v. Armstrong* (j), that the restriction attached to a subsequent marriage. The Master of the Rolls in that case lays down the following general propositions on the nature and effect of the clause in restraint of anticipation:—

(1.) The married woman has a *jus disponendi* over her separate property.

“If the gift be made for her sole and separate use without more, she has, during her coverture, an alienable estate independent of her husband.

(2.) If restrained, she is entitled to the present enjoyment exclusively.

“If the gift be made for her sole and separate use, without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate independent of her husband.

(3.) Separate estate with or without restraint exists only during coverture.

“In either of these cases she has, when discover, a power of alienation; *the restraint is annexed to the separate estate only, and the separate estate has its existence only, during coverture; whilst the woman is discover, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising upon the happening of a marriage.*

(4.) Restraint on alienation depends on, and is a modification of, separate estate, and has no independent existence.

The restriction cannot be considered distinctly from the separate estate, of which it is only a modification; to say that the restriction exists is saying no more than that the separate estate is so modified. . . . If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does, exist without the restriction, but the restriction has no independent existence; when found, it is a modification of the separate estate, and inseparable from it” (k).

It seems to result briefly from the preceding quota-

(j) 1 Beav. 1; and see *In re Ridley, Buckton v. Hay*, 10 Ch. Div. 645.

(k) *Woodmeston v. Walker*, 2 Russ. & My. 197.

tion as follows:—First, That while a spinster, the female entitled for her separate estate, without power of anticipation, may anticipate the entirety or any part of her estate; but that immediately upon her marriage (No. 1), the separate estate, and with it the restraint on anticipation, attach and endure during that coverture; and that upon her widowhood (No. 1) both the separate estate and the restraint dis-attach; and again upon her subsequent marriage (No. 2), and subsequent widowhood (No. 2), and so on *toties quoties*, attaching and dis-attaching, and re-attaching and again dis-attaching, according as she is covert or not from time to time, and for the time being.

General  
conclusion.

As in the case of the separate use, so in the case of the restraint on anticipation, no particular form of words is necessary to restrain alienation, if the intention be clear. Thus, when property was settled, and it was directed that the trustee should during the lady's life receive the income "when and as often as the same should become due," and pay it to such persons as she might from time to time appoint, or to permit her to receive it for her separate use; and that her receipts, or the receipts of any person to whom she might appoint the same *after it should become due*, should be valid discharges for it; it was held that she was restrained from anticipating the income (*l*). So also where property was given to the separate use of a married woman "not to be sold or mortgaged," she was held to take it with a restraint on alienation (*m*). On the other hand, where a testator bequeathed a sum of stock in trust for the separate use of his wife for her life, and directed that it "should remain during her life, and be, under the orders of the trustees, made a duly administered provision for her, and the interest

What words  
will restrain  
alienation,—  
*Field v. Evans*.

What words  
will not re-  
strain aliena-  
tion,—*Parkes*  
*v. White*.

(*l*) *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 7 Ds G. M. & G. 597. And see *Bland v. Dawes*, 17 Ch. Div. 794.

(*m*) *Steedman v. Poole*, 6 Ha. 193; *Baggett v. Meux*, 1 Coll. 138.



given to her *on her personal appearance and receipt*," by any banker the trustees might appoint, it was held that the widow, who had married again, was not restrained from alienating her interest in the stock (*n*). And generally, where expressions are used giving the wife a right to receive separate property "with her own hands from time to time," or so that her receipts "alone for what should be actually" paid into her own proper hands, should "be good discharges," they are, to use the words of Lord Eldon, only an *unfolding* of what is implied in a gift to the separate estate (*o*).

In what cases the trust will be wholly destroyed, so as not to attach on marriage.

Inasmuch as a woman, when discover, had and has full power of alienation over her separate estate, even though coupled with a restraint against anticipation or alienation, the question sometimes arose whether she had not, by her intervening acts during discover, acquired the property unfettered by any restraint, so that neither the separate estate nor the restraint on anticipation would attach or re-attach upon her marriage, as they would have done in the absence of such acts. Thus, in *Wright v. Wright* (*p*), where stock was bequeathed to a woman upon trust for her separate use, without power of anticipation, but without the intervention of trustees; and she afterwards, being discover and *sui juris*, sold the stock, spent a portion of the proceeds, and invested the rest in shares of a joint-stock bank and Canada bonds,—It was held, that by doing so she had determined the trust for her separate use, and with it the restraint on anticipation, Wood, V.C., saying: "Had she allowed the property to remain *in statu quo*, had she left it until her marriage in the form of investment in which it was bequeathed to her by her parents, then, according to

If property remain in *statu quo*, husband must take it with the trusts impressed upon it.

(*n*) *In re Ross's Trust*, 1 Sim. N.S. 196.

(*o*) *Parkes v. White*, 11 Ves. 222; *Acton v. White*, 1 Sim. & St. 429; *Rose v. Sharrod*, 11 W. R. 356.

(*p*) 2 J. & H. 647.

*Newlands v. Paynter* (q), the husband must have been considered as adopting the property in the state in which they left it, and subject to the trusts that, while in that state, they had impressed upon it. But she did not leave it in that form; having the sole ownership of the property, and being single and *sui juris*, she sold it and received the purchase-money. But if she sell it and receive the purchase-money, the trust is destroyed.

When the property was in her hands as money, it was absolutely hers, as if it had never been fettered by any trust whatever. By selling the property, she disposed of it finally and entirely" (r). The effect of disposing of the *corpus* here stated was, of course, to be distinguished from the effect already stated of disposing of the savings of income in the purchase of investments, and the subsequent variation of such investments (s). And apparently now, under the Married Women's Property Act, 1882 (t), an alteration or disposition of the *corpus* even, will not destroy either the separate estate or the restraint on alienation. X

A married woman, although restrained from anticipation, might have barred an estate-tail (u), or accepted payment out of court (v), neither of these acts involving any anticipation. But a court of equity could not (apart from statute) dispense with the restraint on anticipation; therefore, where a testator gave a legacy to a married woman upon this condition, that within twelve months she should execute a certain conveyance of her separate estate, which was subject to a restraint against anticipation, it was held that the court had no power to release the property from that restraint, even though it should be clearly for her benefit (w). But the court might of Court of equity could not dispense with the fetter on alienation; *secus*, now.

(q) 4 My. & Cr. 408. (r) *Buttanshaw v. Martin*, Johns. 89.

(s) *Barrack v. M'Culloch*, 3 Kay. & J. 110.

(t) 45 & 46 Vict., c. 75, ss. 6, 7, 8, 9.

(u) *Cooper v. Macdonald*, 7 Ch. Div. 288.

(v) *In re Crompton's Trusts*, 8 Ch. Div. 460.

(w) *Robinson v. Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535;

course, under the provisions of an Act of Parliament and for the purposes of the Act (x), have released the restraint; and now, under the Conveyancing and Law of Property Act, 1881 (y), the court may, if it thinks fit, and if it is made to appear to the court to be for the benefit of the married woman, and if she consent, make a judgment or order binding her separate property (or her interest in any property), notwithstanding she is restrained from anticipation (z).

#### SUB-SECTION 2.—*The Effects of Recent Legislation.*

20 & 21 Vict.,  
c. 85, s. 21,—  
separate estate  
under.

Under the statute 20 & 21 Vict., c. 85 (Divorce Act), s. 21, amended by the statute 21 & 22 Vict., c. 108, s. 8, if a wife is deserted by her husband, she may obtain an order of protection of her property against her husband and his creditors; and by the statute 20 & 21 Vict., c. 85, s. 25, if she is judicially separated, she is to be deemed a *feme sole* as regards her property; and in case of subsequent cohabitation, such property is to be held to her separate use (a).

41 Vict., c. 19,  
s. 4,—sepa-  
rate estate  
under.

Under the statute 41 Vict., c. 19 (Matrimonial Causes Act, 1878), s. 4, if a husband is convicted, summarily or otherwise, of an aggravated assault within the meaning of the statute 24 & 25 Vict., c. 100, s. 43, on his wife, the court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects

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*Gaskell's Trusts*, 11 Jur. N.S. 780; but see *Sanger v. Sanger*, L. R. 11 Eq. 470, decided under 33 & 34 Vict., c. 93, s. 12. See also *Smith v. Lucas*, 18 Ch. Div. 531.

(x) *Leases and Sales of Settled Estates Act*, 1877, s. 50; *Settled Land Act* 1882, s. 61, sub-sect. 6.

(y) 44 & 45 Vict., c. 41, s. 39.

(z) See *Hodges v. Hodges*, 20 Ch. D. 749. And see *In re Benton, Smith v. Smith*, 19 Ch. Div. 277.

(a) *In re Rainsdon's Trusts*, 4 Dr. 446; *Rudge v. Weedon*, 4 De G. & Jo. 216, 223; *Nicholson v. Drury Buildings*, 7 Ch. Div. 48.

Act. 1859-1860 ✓

1859

of a decree of judicial separation on the ground of cruelty.

Under the Married Women's Property Act, 1870 (b), which came into force the 9th day of August 1870, but which by the Married Women's Property Act, 1882, hereinafter particularly stated, has been repealed as from the 1st day of January 1883, without prejudice nevertheless to any act done or right acquired or liability incurred under the repealed Act, it was enacted briefly as follows:—

By section 1, that the wages and earnings of any married woman, acquired or gained by her, after the passing of the Act, in any employment carried on separately from her husband, and also all gains made by her from the exercise of any literary, artistic, or scientific skill, and *all investments* of such wages, earnings, or gains, should be her separate and exclusive property (c).

By section 7, that where any woman, *married after the passing of the Act*, should during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money, not exceeding two hundred pounds, under any deed or will, such property should be her separate property; and by section 8, that where any freehold, copyhold, or customary hold property should *descend* upon any woman married after the passing of the Act, as heiress or coheiress of an intestate, the rents and profits of such property should be her separate property (d).

(b) 33 & 34 Vict., c. 93; and see *Sanger v. Sanger*, L. R. 11 Eq. 470. See also *In re Heneage*, L. R. 9 Ch. App. 307; and especially *Hancocks v. Lablache*, 26 W. R. 402; 3 C. P. Div. 196.

(c) *Lovell v. Newton*, 4 C. P. Div. 7; *In re Bartholomew's Estate*, 19 W. R. 95; *In re Butlin's Trusts*, 19 W. R. 241.

(d) *In re Voss*, *King v. Voss*, 13 Ch. Div. 504.

Married Women's Property Act, 1870,—separate estate under.

Wages and earnings of all married women acquired after the passing of the Act, and investments thereof.

Personalty devolving on woman married on or after August 9, 1870, *ab intestato*; and sums of money under any deed or will not exceeding £200. Rents and profits of real estate devolving *ab intestato* on woman married on or after August 9, 1870.

Questions  
between hus-  
band and wife.

By section 9, husband and wife, in all questions *between themselves* as to property by the Act made separate property, were enabled to settle such questions upon summons or motion, without bill filed or writ issued as in an action, in the Court of Chancery, or Chancery Division of the High Court, or in the County Court, irrespective of the value of the property in question; also, by section 11, a married woman might, as against third parties, maintain an action *in her own name* for the recovery of *her separate property*, and generally might have *in her own name* the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such property, as if it belonged to her as an unmarried woman.

Wife's right  
of action as  
against third  
parties.

Wife's liability  
for her debts  
contracted  
before  
marriage.

Extent of  
husband's  
liability for  
same debts  
under Married  
Women's Pro-  
perty Amend-  
ment Act,  
1874.

By section 12, a husband was exempted from all liability for the debts of his wife contracted before marriage; and the wife was made exclusively liable therefor, to the extent of her separate property. However, under the Married Women's Property Act, 1874 (e), which came into force the 30th day of July 1874, but which has been repealed as from the 1st day of January 1883 by the Married Women's Property Act, 1882, without prejudice, nevertheless, to any act done, or right acquired, or liability incurred under the repealed Act, husband and wife might have been again jointly sued for any such debts, and the husband was again rendered liable therefor, but to the extent only of the assets in the Act specified, that is to say, to the extent of the following assets:—

- (1.) The value of the personal estate in possession of the wife which shall have vested in the husband;
- (2.) The value of the choses in action of the wife

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(e) 37 & 38 Vict., c. 50; and see *West of England and South Wales Bank, Ex parte Hatcher*, W. N. 1879, p. 136.

which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession ;

(3.) The value of the chattels real of the wife which shall have vested in the husband and wife ;

(4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or which with reasonable diligence he might have received ;

(5.) The value of the husband's estate or interest in any property, real or personal, which the wife, in contemplation of the marriage, may have transferred to him or any other person ; and,

(6.) The value of every property, real or personal, which the wife, in contemplation of her marriage with the husband, shall with his consent have transferred to any other person with the view of defeating or delaying her existing creditors (f).

And lastly, by section 13, a married woman possessed of separate property was made liable for the maintenance of her pauper husband ; and by section 14, was made liable to maintain her children.

Under the Married Women's Property Act, 1882 (g), which received the royal assent the 18th day of August 1882, but which does not come into operation until the 1st day of January 1883 (s. 25), and which repeals (as hereinbefore stated) the Married Women's Property Acts, 1870 and 1874, subject as hereinbefore expressed (s. 22), it is provided and enacted (in substance) as follows :—

Married Women's Property Act, 1882, — separate estate under.

By section 2, that every woman marrying on or after the 1st day of January 1883 shall hold as her

What property is to be separate,—

(f) *London and Provincial Bank, v. Bogle*, 7 Ch. Div. 773 ; *De Greuchy v. Wills*, 4 C. P. Div. 362 ; *Collet v. Dickinson*, 4 Exch. Div. 285 ; *Matthews v. Whittle*, 13 Ch. Div. 811.

(g) 45 & 46 Vict., c. 75.

- (1.) In case of marriage on or after 1st January 1883. separate property all real and personal estate which shall belong to her at the time of the marriage, or which shall come to her after the marriage, including the wages and earnings of any separate employment, and the gains of any literary, artistic, or scientific skill carried on or exercised by her separately from her husband; and by section 5, that every woman married before the 1st day of January 1883 shall hold as her separate property all real and personal estate, "her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue" on or after the 1st day of January 1883, including such wages, earnings, and gains as aforesaid.
- (2.) In case of marriage before that date.

Deposits, consols, government annuities, stocks, shares, &c.,—  
(1.) When to be separate property, and transferable by the married woman alone.

By section 6, that all deposits in post-office or other savings banks, or in any other bank, and all consols or reduced or other government annuities, and all public stocks and funds, and all stocks and funds of the Bank of England, or of any other bank, and also all shares and stocks of any corporate company or society which on the 1st day of January 1883, are standing in the sole name of a married woman, or (by section 8) in her name jointly with any other person (other than her husband), shall be deemed her separate property, until the contrary is shown; and by section 7, that all such annuities, stocks, and shares as shall after the 1st day of January 1883 be allotted to or otherwise stand in the sole name of a married woman, or (by section 8) in her name jointly with any other person (other than her husband), shall be deemed her separate property, until the contrary is shown; and the liability (if any) attaching to such annuities, stocks, or shares shall be incident to the married woman's separate estate only, and shall not attach to her husband, and he need not join in the receipt of the dividends thereon or in the transfer thereof (s. 9); but no corporation or company is obliged or authorised to accept or admit a married woman as a holder of its

stock or shares (s. 7). Also, by section 10, any of the (2.) When not  
 aforesaid investments, if made with her husband's to be separate  
 moneys without his consent, are to become and be property.  
 the husband's property; and if made with the husband's  
 moneys in fraud of his creditors, or if remaining in the  
 order and disposition of the husband, are made void  
 as against his creditors.

By section 1, a married woman's separate estate is rendered wholly independent of the intervention of any trustee, and she is rendered capable of contracting, and is also rendered liable upon all such contracts, in respect and to the extent of her separate estate; and every contract entered into by her is to be *primâ facie* considered a contract entered into by her in respect of her separate estate; and she may sue or be sued either in contract or in tort or otherwise as if she were a *feme sole*, and without her husband being joined either as a co-plaintiff or as a co-defendant with her; and the costs and damages recovered by or against her are to go to increase or diminish (as the case may be) her separate estate, and are not to be otherwise recoverable or applicable; and if she carries on any trade separately from her husband, she is, in respect of her separate property, liable to the bankruptcy laws; and her liabilities aforesaid extend as well to the separate estate which she is entitled to at the date of her contracts, as also to all separate estate which she may thereafter acquire. And by section 4, separate estate is to include any property subject to a general power of appointment which the married woman may have exercised by her will. But by section 3, if she lends or intrusts any separate property to her husband, and he becomes bankrupt, such separate property is to be treated as assets of the husband, the wife having only a right of proof against his estate as a creditor for the amount, and her right of proof being posterior to all claims of the other creditors for value of the

Married woman having separate estate may hold it without a trustee, and may contract and incur liabilities like a man, and, being a trader, may be made a bankrupt.



husband. And by section 24, the word "contract" as used in the Act, is to include, for the purposes of the Act, the acceptance of any trust or of the office of executrix or administratrix, so that the liability of the separate estate shall extend to any breach of trust or devastavit committed or permitted by such married woman, and whether before or after her marriage, and her husband (provided he have not intermeddled) is not to be liable for any such breach of trust or devastavit. And by section 18, a married woman who is an executrix, administratrix, or trustee is to be regarded as a *feme sole*, so that her husband has (in the general case at least) no occasion for intermeddling in his wife's conduct as trustee, executrix, or administratrix.

Ante-nuptial debts, &c.,—wife liable for, and husband liable concurrently, to what extent.

By section 13, as regards all debts contracted or liabilities incurred, and all contracts or torts entered into or committed respectively by a married woman before her marriage, she is to continue liable in respect and to the extent of her separate property for all sums recovered against her, and also for all costs of suit; and by section 14, as regards all the same several debts and liabilities, contracts and torts, the husband is made liable, but not further or otherwise than to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting any payments made by him and any sums for which judgment may have been *bond fide* recovered against him in any proceeding at law in respect of any such debts, liabilities, contracts, or torts; and as between the husband and wife, the separate estate is to be deemed *prima facie* primarily liable therefor (s. 13); and as regards women married before the 1st January 1883, the provisions of sections 13 and 14 are neither to increase or diminish the respective liabilities of husbands and wives in respect of such ante-nuptial debts or liabilities, contracts or torts of the wife. And

by section 15, a plaintiff may sue both husband and wife jointly if they are concurrently liable as aforesaid, or solely if either of them without the other is liable; and the judgment as against the husband is a personal one to the extent of his liability, and as against the wife is one as to her separate property.

By section 12, every married woman, in respect of her separate property, may in her own name pursue against her husband, and also against third parties, all civil and also all criminal remedies for the protection and security of such separate property; but as regards criminal proceedings, these are not to lie by the wife against her husband while they are living together, nor in respect of any act done by the husband while they were living together, and he was not in the act or on the point of deserting her; but excepting as aforesaid, a wife may not sue her husband for a tort, or he her; but by section 16, he may prosecute her, being the offender, wherever she might prosecute him, being the offender; and husband and wife may give evidence against each other in all such criminal proceedings (s. 12).

Remedies (civil and criminal) of married woman for security and protection of separate estate.

Also, by section 17, any question between husband and wife regarding the wife's separate property, or what she alleges to be such, may at the suit of either party or (in the case of stocks and shares) of the bank corporation or company suing as a stakeholder only and not otherwise, be settled without suit on an application by summons or otherwise to the High Court or to the County Court (and, as regards the County Court, irrespectively of the amount or value of the property in question); and the court may make such order or direct such inquiry as it thinks fit; and an order of the High Court is appealable in the usual way, and so also is any order of the County Court; and in addition the proceedings (if in the County

Summary remedy, in case of disputes between husband and wife regarding alleged separate property.

Court) may be removed from the County Court when the value of the property in question is beyond the limit (irrespectively of the Act) of the County Court jurisdiction; also, in any proper case, the proceeding may take place *in camera*.

Wife's maintenance of pauper husband, and of her children and grandchildren.

By section 20, a married woman having separate estate is liable to the guardians of the poor to maintain her husband becoming chargeable to the parish; and by section 21, is liable (but concurrently with her husband) to maintain her children and grandchildren.

Married woman's legal personal representative,—position of.

By section 23, the legal personal representative of a married woman having separate estate has in respect of such estate the same rights and liabilities as the married woman if living would have.

Policies of life assurance effected by married woman (or by her husband), and trusts of policy moneys.

By section 11, a married woman having separate estate may effect a policy of assurance for her own separate use, and either on her own life or on that of her husband, and may also insure her own life (as may also a husband his own life) expressly for the benefit of her (or his) husband (or wife), with or without her (or his) child or children or any of them; and in the case of such insurance, a trust arises in favour of the objects in whose favour the insurance is expressed to be made, and the policy moneys are not (unless upon a total failure of the objects of the trust) to form any part of the estate or assets of the life insured; but this section is not to authorise policies to be effected or the premiums thereon to be paid in fraud of creditors. And either in the policy itself or by any memorandum under the hand of the party effecting the policy, a trustee may be appointed of the policy moneys; and failing such appointment, the legal personal representative of the life insured is

\* The estate of a married woman having separate estate?

made the trustee, or the court will appoint one, if necessary or desirable.

By section 19, the Act (or anything therein) is not to interfere with or to affect any settlement (or agreement for a settlement) made (or to be made), whether before or after marriage, respecting the property of any married woman; and the Act (or anything therein) is not to interfere with or to render inoperative any restraint on anticipation attached (or to be attached) to any corpus or income, but any such restraint created by the married woman herself on her own property is to be invalid as against her creditors before marriage; and any settlement (or agreement for a settlement) made (or to be made) by a married woman of her property is to be subject to all (if any) the same causes of invalidity that the like settlement made by a man of his property would be subject to, at the suit of creditors impugning it as fraudulent.

The Act is not to affect the provisions of settlements or of agreements for settlements; and in particular the restraint on anticipation.

Certain causes invalidating settlements by married women, and their restraints on anticipation.

## SECTION II.—PIN-MONEY AND PARAPHERNALIA.

I. PIN-MONEY may be defined as a yearly allowance settled upon the wife before marriage for the purchase of clothes or ornaments, or otherwise for her separate expenditure, and in order to deck her person suitably to the rank and agreeably to the tastes of her husband. It is a sum allowed for her personal expenses, in order to save a constant recurrence by the wife to the husband upon every occasion of a milliner's bill or jeweller's account coming in, and for pocket-money and things of that sort; but of course it does not mean the carriage, and the house, and the gardens, but the ordinary personal expenses (*h*). Gratuitous gifts, or payments from time to time, made to the wife by her

Pin-money for wife's ornament and personal expenditure.

To save the constant recurrence of wife to husband for trifling expenses.

(*h*) *Howard v. Digby*, 8 Bligh, N.S. 265.

husband after marriage, for the same purposes, are also considered as pin-money (i).

Not like her separate estate in some few respects, but like it in most respects.

Bearing in mind the objects for which pin-money is given, it follows that it is in some respects very different from money set apart for the wife's sole and separate use during the coverture, excluding the *jus mariti*; but notwithstanding the difference of the objects, pin-money is in many (and these the legally most important) respects very similar indeed to separate estate; e.g.,—

She can claim only one year's arrears.

1. When the wife permits her pin-money to run into arrear for a considerable time, upon surviving her husband, she will only be permitted to claim arrears for one year prior to his death (j); for the very object of the provision being to enable the wife to deck her person suitably to her husband's rank, without having recourse to him continually for small sums of money, that object excludes the supposition that she may accumulate her pin-money while the expenses of her person and the demands upon her pocket, for those things to which pin-money is applicable, have been otherwise defrayed by her husband (k).

When she may claim all arrears.

2. Where, however, it appears that the wife has complained of her pin-money being paid short, and the husband tells her she will have it at last, she is held entitled to *all* arrears due at her husband's death (l).

She cannot claim arrears where he has provided her apparel, &c.

3. Where the husband has paid for all the wife's apparel and provided for all her private expenses, she

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(i) 2 Bright, H. & W. 288.

(j) *Aston v. Aston*, 1 Ves. Sr. 267; *Townshend v. Windham*, 2 Ves. Sr. 7.

(k) *Howard v. Digby*, 8 Bligh, N.S. 269.

(l) *Ridout v. Lewis*, 1 Atk. 269.

cannot claim for any arrears at the death of her husband, for this will be considered a satisfaction by the husband (*m*).

4. Also, the wife's executors have no claim against the husband or his estate, even for one year's arrears (*n*). Wife's executors cannot claim even one year's arrears.

II. PARAPHERNALIA (*o*).—The paraphernalia of the wife include such apparel and ornaments given to the wife as are suitable to her condition in life, and as are expressly given to be worn as ornaments of her person only (*p*). Paraphernalia include gifts to be worn as ornaments.

Jewels given to the wife by her husband after marriage will be considered her paraphernalia, where they are given her expressly for the purpose of wearing them, as befitting her station in life (*q*). But gifts from the husband to the wife may be made to her separate use, where they are given to her absolutely, and not merely to be worn as ornaments for her person (*r*).

Old family jewels, which have been handed down from father to son, do not constitute the paraphernalia of the wife; but she may, of course, acquire them by gift, purchase, or bequest, in which case they would belong to her for her separate use (*s*). But not old family jewels.

The better opinion seems to be, that where articles

(*m*) *Thomas v. Bennet*, 2 P. W. 341; *Howard v. Digby*, 8 Bligh, N. S. 269.

(*n*) *Howard v. Digby*, 8 Bligh, N. S. 271.

(*o*) The word paraphernalia is derived from the Greek word *παράφερνῃ*, i.e., property belonging to the wife over and above (*παρα*) the dowry (*φέρνῃ*) which she brought to her husband.

(*p*) *Graham v. Londonderry*, 3 Atk. 394.

(*q*) *Jervoise v. Jervoise*, 17 Beav. 571; *Graham v. Londonderry*, 3 Atk. 394.

(*r*) *Graham v. Londonderry*, 3 Atk. 394; *Grant v. Grant*, 13 W. R. 1057.

(*s*) *Jervoise v. Jervoise*, 17 Beav. 570.

Nor gifts by a stranger before or after marriage. such as ordinarily constitute paraphernalia are given to the wife, either before or after marriage, by a relative or friend, they will be considered as given to her separate use, and not as paraphernalia (t).

Wife cannot dispose of paraphernalia during husband's life. Husband cannot dispose of them by will.

The wife cannot dispose of her paraphernalia by gift or by will during her husband's lifetime. But the husband may, by act *inter vivos*, during her life, dispose of her paraphernalia by sale or gift (u). He cannot, however, dispose of them by his will (v); but if he does so, and confers other benefits upon the wife by his will, she will be put to her election between her paraphernalia and any interest which she may take under the will (w). As the husband may dispose of his wife's paraphernalia in his lifetime, so they will be liable to his debts (x).

Paraphernalia liable to his debts.

Widow's claim to paraphernalia preferred to general legacies.

With respect to the equity of marshalling the assets in favour of the wife, where the husband dies indebted and her paraphernalia are taken by his creditors in satisfaction of their demands, after all the general personal estate is exhausted by the creditors, in the administration of assets, the widow's claim to her paraphernalia is preferred to general legacies, and it follows that she is entitled to marshal assets in all those cases in which a general legatee would have that right (y). In fact, as already stated in the chapter on "Marshalling of Assets," the wife, as regards her paraphernalia, has the first claim after simple contract creditors.

If the alienation by the husband, in his lifetime, of

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(t) *Graham v. Londonderry*, 3 Atk. 394; *Lucas v. Lucas*, 1 Atk. 270; *Williams v. Mercier*, 9 Q. B. D. 337; but see *Jervoise v. Jervoise*, 17 Beav. 571.

(u) *Seymore v. Tresilian*, 3 Atk. 358.

(v) *Ibid.*

(w) *Churchill v. Small*, 2 Kenyon, pt. 2, p. 6.

(x) *Campion v. Cotton*, 17 Ves. 273; and see 2 Ves. Sr. 7.

(y) *Tipping v. Tipping*, 1 P. W. 729; *Snelson v. Corbet*, 3 Atk. 369; see also p. 282, *supra*.

the wife's paraphernalia be not absolute, but only by way of pledge or mortgage, his wife surviving him will be entitled to have them redeemed out of his personal estate, even to the prejudice of legatees, her right being anterior to them, and to be preferred to their claims, which are merely voluntary (z).

On partial alienation by husband, must be redeemed out of the personal assets, as against legatees.

### SECTION III.—THE WIFE'S EQUITY TO A SETTLEMENT AND HER RIGHT OF SURVIVORSHIP.

Marriage used to be and (subject to the various Married Women's Property Acts above explained) still is a gift to the husband of all the personal property, other than separate property, to which the wife is entitled at the time of the marriage, or to which she may afterwards become entitled, subject only to the condition (as regards any chose in action) of his reducing it into possession during the coverture; and no distinction exists, in this respect, between property to which the wife is entitled in equity and property to which she is entitled at law. *Prima facie*, then, the wife's property, whether at law or in equity, used to become and (subject as aforesaid) still becomes the husband's. On what grounds, therefore, was the interference of equity derogating from the husband's legal rights, and compelling him to make a settlement on his wife, to be supported?

Marriage a gift of wife's personal property to husband, both at law and in equity.

Firstly, It is safe to assert that her equity to a settlement did not and does not depend on any right of property in her, and this position will appear the more clear when it is considered to what limitations her equity is subject; for the amount is discretionary in the court, and if the wife insists upon it, she must claim it for herself and her children, and not for her-

Her equity to a settlement does not depend on a right of property in her.

(z) *Graham v. Londonderry*, 3 Atk. 393.



self alone,—limitations which are wholly inconsistent with a right of property in her (a).

Her equity arises from the maxim, "He who seeks equity must do equity."

The right being thus independent of property, the only ground on which it can rest was and is the control which courts of equity exercised and exercise over property falling under their dominion. It is, in truth, the mere creature of equity deduced originally, where the husband sued, from the rule, that he who comes into equity must do equity ; that is, the court refuses its aid to the plaintiff-husband in seeking to acquire what the law would have given him if the court of common law had had jurisdiction in the matter ; and as the court of law had no jurisdiction, he returned into the court of equity, which consented to lend him its aid only upon certain conditions which the court considered he ought to comply with, although the subject of the condition should be one which the court would not have otherwise enforced (b). And inasmuch as a father would not, in the general case, have given his daughter in marriage without insisting on some provision being made for her and her children, so a court of equity, standing, vaguely speaking, *in loco parentis* towards all married women, will not allow the husband to come into a court of equity for the fortune of his wife without his first making a provision for her.

The court imposes conditions on the husband coming as plaintiff.

Principle extended to the husband's general assignees.

The principle, after having been once thus far recognised where the husband was plaintiff, was next enforced where the assignees of a bankrupt or insolvent husband were plaintiffs, upon the ground that the assignees, claiming in right of the husband, should be aided only upon the same conditions as the husband himself (c). Subsequently the same rule was held to apply as against an assignee of the husband for

(a) *Osborne v. Morgan*, 9 Hare, 434.

(b) *Sturgis v. Champneys*, 5 My. & Cr. 102.

(c) *Oswell v. Probert*, 2 Ves. Jr. 682.

valuable consideration being plaintiff. "It would be whimsical, then, that the assignment by the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in. The guard of the court upon the wife's interest would be very singular if the husband, not being entitled at law, must assign it for a valuable consideration to another person, who would be entitled in equity" (*d*). Eventually, the principle was extended to suits instituted by the wife herself, and in *Elbank v. Montolieu* (*e*) it was decided that as to personalty, where it was perfectly clear that the subject-matter in controversy must be determined and decided upon and distributed in the Court of Chancery, there the wife might come to assert her equity, and need not wait until the defendant came into court to seek the court's aid in the matter.

Then to particular assignees for value.

Wife permitted to assert her right as plaintiff.

Before proceeding to enumerate the varieties of property out of or in respect of which the wife used to be and (subject as aforesaid) still is entitled to her equity, it will be convenient and serviceable to the student to express in an abstract form the guiding principles governing the Court of Equity in the matter. There being, first of all, a possibility of the husband getting hold of and keeping (by virtue of the right which the law gives to him as husband) the property in question of the wife, the court next inquires whether the wife, if she survived her husband, would or would not take the entirety of the property by virtue of her right of survivorship hereinafter explained; and if (but only if) there is a possibility of the husband getting and keeping the property wholly, and the wife would not be entitled to the entirety thereof by survivorship, then there being this danger to the wife, and

The general principle upon which the court acts in decreeing or not to married woman a settlement.

(*d*) *Macaulay v. Philips*, 4 Ves. 19; *Scott v. Spashett*, 3 Mac. & G. 599.

(*e*) 1 L. C. 464; *Robinson v. Robinson*, 12 Ch. Div. 188; *In re Bryan*, 14 Ch. Div. 516.

such danger being also reasonably imminent, the court assumes jurisdiction to inquire into the question of the wife's equity to a settlement out of the property that is so in danger: And upon this inquiry, the court inquires principally, whether the property in question is or not legal, or is or not equitable; and then generally the court answers—(1.) If the property is *equitable*, that the wife is entitled to an equity out of it (there being no other sufficient reasons for denying her the equity); and (2.) If the property is *legal*, that the wife is *not* entitled to any equity out of it (there being no other sufficient reasons for decreeing to her the equity). In brief, the court asks,—Firstly, Would the husband take *all*? and if the answer is, "Yes;" then, secondly, Is the property *legal* or is it *equitable*? But having regard to the provisions of the Married Women's Property Act, 1882, as above expounded, there cannot any longer, after the 1st January 1883, be much (if any) danger of the husband now getting, at least of keeping, all the property; and the equity to a settlement seems to be now on the point of becoming obsolete, on and as from the 1st January 1883, except as to property thereafter falling into possession, the *title* to which has theretofore vested.

The general principle illustrated,—

(1.) Wife's term, or leasehold interests.

We now proceed to apply these principles:

(1.) As to the husband's power over his wife's leaseholds, and her equity to a settlement out of them against him and his assignees, the rule varied according as the husband's title, in her right, was legal or was equitable. In *Hanson v. Keating* (*f*), where the husband and wife assigned by way of mortgage the *equitable* interest of the husband in right of his wife, in a term of years, and the mortgagee filed his bill against the husband, the wife, and the trustee of the legal estate, for a foreclosure and assignment of the term, it was

(a.) Being equitable,—wife had an equity.

held that the wife was entitled to a provision for life by way of settlement out of the mortgaged premises. Where, however, a similar assignment took place of the wife's *legal* interest in leaseholds, it was held, that on the mortgagee filing a bill for foreclosure, the wife had no equity to a settlement out of them, inasmuch as a purchaser took a good legal title from the husband (g).

(2.) As regards the pure personal property of the wife, there was no doubt at all that, if that property was *legal*, the wife had no equity; on the other hand, if that property was *equitable*, there was just as little doubt that the wife had an equity out of it, provided she was entitled to the absolute interest in the property, and this against the husband and everybody claiming under him (h).

But an important distinction was made between cases in which the wife took an *absolute* interest, and those in which she took a *life-interest* only. As to the former, it was settled that a purchaser from the husband of the wife's equitable chose in action, to the corpus of which she was entitled, was in no better situation than the husband himself; for where the interest sought to be recovered through the aid of the court was an absolute equitable interest, the court, though enforcing against the husband what was called the wife's equity, acted, in truth, for the benefit, and with a view to the interests not of her only, but also of her children. It dealt with the fund in analogy to what a prudent parent would probably have done in giving a portion to his daughter, and the doctrine having been acted on for centuries, . . . *no purchaser*

(g) *Hill v. Edmonds*, 5 De G. & Sm. 603; *Hatchell v. Elgesso*, 1 Ir. Ch. R. 215; and see *Pigott v. Pigott*, L. R. 4 Eq. 549.

(h) *Scott v. Spasbetti*, 3 Mac. & G. 603; *Bereaford v. Hobson*, 1 Madd. 362; *Burdon v. Dean*, 2 Ves. Jr. 608.

*from the husband could be deceived or mistaken as to how his rights will be dealt with by the court.* He knew that the fund was the fund of a married woman; and that relation alone, without more, gave rise to her rights, and, through her, to the rights of her children. If therefore he by contract put himself in the place of the husband, he could not complain that he was in no better position than the person to whose rights he succeeded.

(bb.) But if interest was for life only,—then the wife had or had not an equity, inversely as the husband was or was not maintaining her.

4 The case was not the same where the court had to deal with a mere life-interest. No provision in such a case could be made for the children. The question, then, was one exclusively between the husband and the wife. In directing a settlement of a wife's fortune, the court never (assuming that there was no misconduct in the husband) deprived him of the income of the fund.

That is to say,—

(1.) Husband took the fund as long as he maintained the wife.

(1.) It was his duty to maintain his wife, and to enable him to do so, this court followed the course of the common law, and gave him a right to what, but for the marriage, would be the natural fund for supporting the wife. By the marriage, and the duty thereby entered into of maintaining her, he became a purchaser of what was reasonably and naturally applicable towards enabling him to perform his duty.

(2.) Her equity out of the fund arose on his failure to maintain her.

(2.) It is true that if he failed in the discharge of that duty, if he deserted his wife and ceased to maintain her, the court would not help him to get at the fund which he could only reach through its process, without securing for the wife a portion of his income. But this was done not by reason only of the relation resulting from the marriage, but because the husband had failed to perform the duties under which he had brought himself; it was an equity enforced in favour of the wife arising from the husband's misconduct.

(3.) Now to involve third persons in questions as to how far the husband had or had not duly maintained his wife, would, it was thought, be inexpedient, and might give rise to discussions irritating and unseemly. It might also happen that a husband duly maintaining his wife might, for their common advantage, reasonably sell her life income, and it would be strange that the purchaser's title should in such a case have been defeated by the subsequent misconduct of the husband in not maintaining his wife (i).

(3.) Purchaser of life-estate not bound to inquire as to whether the husband was maintaining her.

In accordance with the above principles, it was held that a married woman, whose husband had deserted her (j), or did not maintain her (k), or had become bankrupt (l), was not entitled to a settlement out of property in which she had an equitable life-interest, as against a person to whom her husband had assigned it for value *previous* to his desertion or bankruptcy. Nor had she any equity to a settlement out of her life-interest where she was living with and was maintained by her husband, though, as she alleged, in a manner very inadequate to her fortune (m).

(4.) A distinction was, however, taken between the position of a particular assignee for value of the husband, and his general assignee or trustee in bankruptcy. The reason for this difference was thus explained by Leach, V.C. :—"Where an equitable interest is given to the wife *for her life only*, this court does permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true that if the husband desert his wife, and fail to perform the obligation of maintaining her, which is

(4.) Distinction between a particular and a general assignee.

(i) *Tidd v. Lister*, 3 De G. M. & G. 869, 870.

(j) *Wright v. Morley*, 11 Ves. 12.

(k) *Tidd v. Lister*, 10 Hare, 140.

(l) *Elliot v. Cordell*, 5 Mad. 149.

(m) *Vaughan v. Buck*, 13 Sim. 404.

X

The trustee in bankruptcy or general assignee always had notice, *ex hypothesi*, that husband incapable of maintaining his wife, and neglecting to do so, while a particular assignee might have no such notice, and was not bound to inquire.

No equity to arrears of income.

the condition upon which the law gives him her property, this court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife; and if the husband becomes bankrupt, . . . this court will fasten the same obligation of maintaining the wife out of the property of this description which devolves by law upon the general assignee, for *when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife*; but the same principle does not necessarily apply to a *particular assignee* for a valuable consideration who purchased this interest *when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife*" (n).

However, even where the wife was held entitled to an equity out of her life-interest in personalty, she was not entitled to any settlement out of arrears of income accrued due before she had set up any claim thereto, but such arrears were paid to the husband or his assignees (o).

(3.) Realty.—  
(a.) Of Inheritance :  
(aa.) Being legal,—  
(bb.) Being equitable,—  
the wife had no equity in either case.

(3.) As to the realty of a married woman, if that was realty of inheritance either in fee-simple or in fee-tail, it was clear that the question of the wife's equity to a settlement out of that realty (as regarded the fee-simple or fee-tail estate therein) did not arise, because there was no possibility of the husband taking or keeping the inheritance adversely to his wife. In this case, therefore, whether the estate was legal or equitable, the wife had no equity, because she had something better, namely, the whole indefeasible inheritance; and this is now the position generally of all the property of married women, for under the Married Women's Property Act, 1882, there is now (*i.e.*,

(n) *Elliott v. Cordell*, 5 Mad. 149.

(o) *Re Carr's Trusts*, L. R. 12 Eq. 609; 19 W. R. 675.

as from the 1st January 1883) no danger of the husband taking his wife's property, real or personal, unless the *title thereto has accrued before the 1st January 1883.*

In the *Life Association of Scotland v. Siddal* (p), it was held that where a married woman was equitable tenant in tail of land to be purchased with a sum of trust money, which she had purported to join with her husband in mortgaging, she was not entitled to a settlement out of the capital. Turner, L.J., said: "Whatever may be the right of a married woman to have a provision made for her out of the *income* of an estate of which she is equitable tenant in tail, it is not, as I apprehend, according to the course of the court, or indeed in its power, to order a settlement to be made of the *estate or land* to be purchased. The equity for a settlement attaches on *what the husband takes in right of the wife*, and not *what the wife takes in her own right* [and which she can keep in spite of her husband]; and the estate-tail being in the wife, I do not see\* what power this court can have to order a settlement of it to be made, or to render such a settlement, if made, binding and effectual against the wife."

Because, she has something better.

On the other hand, in *Sturgis v. Champneys* (q), where (b.) Life-estate in realty,—the *provisional assignee* of an insolvent debtor, whose wife (aa.) Being legal,—wife was entitled *for life* to real property, was obliged to come into equity to enforce his title to the rents (bb.) Being equitable,—wife had an equity, at least during the joint lives of the husband and wife, in consequence of the legal estate being outstanding in mortgagees,—It was argued that the court would not if husband not maintaining her.

(p) 3 De G. F. & Jo. 271.

\* The judge here spoke satirically:—Of course, if the wife could keep (and she could keep) the whole fee-tail at law, what occasion was there for the court of equity, or what power in that court, to take the whole away, and give her back a half or two-thirds on the pretext of protecting her! The judgment has frequently been wholly misunderstood from not perceiving the Lord Justice's satire.

(q) 5 My. & Cr. 97; *Taunton v. Morris*, 8 Ch. Div. 453; 11 Ch. Div. 779.



secure a provision for a wife unless the property were such as to be a proper subject of equity; and that in this case Lady Champneys had a legal estate for life, and that it was only by the accident of the prior incumbrance being still existing, and the legal estate outstanding, that the plaintiff was compelled to come into equity. But Lord Cottenham held the wife entitled to a settlement out of the rents of her life-estate, saying: "*If the life-estate be attainable by the husband or his assignee at law, the severity of the law must prevail; but if it cannot be reached otherwise than by the interposition of this court, equity, though it follows the law, and therefore gives to the husband or his assignee the life-estate of the wife, yet withholds its assistance for that purpose until it has secured to the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. Upon the same principle the ordinary interposition of this court in compelling a settlement of the property of married women, was originally founded, although the wife is permitted actively to assert her equity as a plaintiff; and if such be the principle, what difference can it make when the assignees of the husband are applying to this court for its assistance to obtain the property, that the estate of the wife is not a trust, but that the recovery at law is prevented only by the existence of a prior legal trust estate?*"

And in *Wortham v. Pemberton* (r), where Miss W. was tenant in tail of an estate *subject to a jointure*, payable to Mrs. H., *secured by a term of years*, there being a proviso for cesser of the term on the decease of Mrs. H.; and Miss W. married Mr. N., who had per-

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(r) 1 De G. & Sm. 644; but see the remarks of Westbury, L.C., in *Gleaves v. Paine*, 1 De G. Jo. & Sm. 93; Dart's V. & P. 529.

suaded her to elope with him, and had been imprisoned for the abduction,—It was held that she was entitled to her equity to a settlement out of her equitable life-estate in the estate-tail, for there was a legal title which prevented the enjoyment except by means of a court of equity, and rendered the title to the rents equitable *so long as the term lasted*; therefore the plaintiff was entitled to a settlement out of the rents *until the determination of the term*.

Inasmuch as alienation by the wife would have defeated her equity to a settlement, it is necessary to consider in what ways a married woman might validly dispose of property, out of which she would otherwise have been entitled to claim her equity, so as to preclude herself from afterwards claiming that equity.

Wife's equity  
defeated by  
her alienation.

1. *In realty*.—Under 3 & 4 Will. IV., c. 74 (the Act for the abolition of fines and recoveries), and 8 & 9 Vict., c. 106, s. 6, a married woman might dispose of her estates of freehold (and, *semble*, even of leasehold tenure), and might also release or assign any sum of money charged on lands, or the produce of land directed to be sold, whether her interest was in possession or in reversion (*s*), by a deed duly acknowledged by her, and executed with the concurrence of her husband, in the manner provided by the first-mentioned Act (*t*). She might also alienate her copyholds by surrender, jointly with her husband, on being separately examined as to her free consent by the steward or his deputy (*u*).

1. Interests in  
realty.

2. *In personality*.—A married woman's interests in personal estate, so far as they were estates in possession, vesting in her husband on marriage, her power of disposition over them was a question which did not arise, but her husband might have solely dis-

2. Interests in  
personality.

(*s*) *Tuer v. Turner*, 20 Beav. 560; *Briggs v. Chamberlain*, 11 Hare, 69.

(*t*) 3 & 4 Will. IV., c. 74, ss. 77, 79.

(*u*) 1 Wats. Cop. 63.

posed of them, subject only to her establishing, if she was able, her equity to a settlement out of them; and so far as they were estates in reversion, her power of disposition over them was in abeyance during the coverture, as was (in effect) also her husband's power of disposition over them, excepting only in certain cases in which, as falling under Malins's Act, 20 & 21 Vict., c. 57 (*v*), she might, with the concurrence of her husband, and by deed acknowledged, have disposed of same.

Wife's choses in action belonged to husband if he reduced them into possession.

As to the nature and extent of the husband's interest in and power over the wife's choses in action, the old common law (apart from statute) said, that marriage was only a qualified gift to the husband of the wife's choses in action, viz., a gift to him only upon condition that or if he reduced them into possession during (in effect) his life, so that if he died before his wife, and without having reduced such property into possession, she, and not his personal representatives, would have been entitled to the property. This reduction into possession was (so far as regarded the pure personal estate of the wife) a necessary and indispensable preliminary to the husband's either having in himself or being able to convey to another any assured right of property in respect of such personal estate; although, as regarded the chattels real of the wife, a previous reduction thereof into his possession was not a necessary preliminary to the husband's power of disposition over them (*w*).

Wife surviving her husband took her reversionary interests which he had not reduced into possession.

In accordance with these principles, in *Purdew v. Jackson* (*x*), where a husband and wife, by deed executed by both, purported to assign to a purchaser for valuable consideration a fund in which the wife had a vested

(*v*) *Post*, p. 386.

(*w*) *Purdew v. Jackson*, 1 Russ. 66; *Donne v. Hart*, 2 Russ. & My. 363; *Duberley v. Day*, 16 Beav. 33; and see pp. 340, 341, *supra*.

(*x*) 1 Russ. 1.

estate in remainder, expectant on the death of a tenant for life, and both the wife and the tenant for life outlived the husband, it was decided that the wife was entitled by right of survivorship, and notwithstanding her concurrence in the assignment to claim the whole of her share of the fund against such particular assignee for valuable consideration. "I still continue of opinion," said the Master of the Rolls, "that all assignments made by the husband of the wife's outstanding personal chattels, which are not or cannot be then reduced into possession, . . . pass only the interest which the husband has, subject to the wife's legal right by survivorship" (y).

Assignee could take no more than the husband had to give.

It was further decided before the passing of Malins's Court had not power to take wife's consent to part with her reversionary interest. Act, 20 & 21 Vict., c. 57, with regard to the wife's reversionary interests, that the court had not even the power of taking the wife's consent to part with them. "If the wife by her consent could pass a remainder or reversion in personal property to the husband, she would part not only with a future possible equity, but with her chance of possessing the whole property by surviving her husband; and to give this effect to her consent would make it analogous to a fine at law with respect to real estate, a principle always disclaimed in a court of equity. A court of equity interferes to protect the property of the wife against the legal rights of the husband, and will never lend itself as an instrument to enable the husband to acquire a right in the wife's personal property which he can by no means acquire at law" (z).

It was held that a claim by the wife for a settlement out of her reversionary interest in property, so long as it continued reversionary, could not be sup-

She had no equity out of reversionary interest so long as reversionary.

(y) *Elliott v. Cordell*, 5 Mad. 149; *Stanton v. Hall*, 2 Russ. & My. 175, 182; *Re Duffy's Trusts*, 28 Beav. 386.

(z) *Pickard v. Roberts*, 3 Mad. 386; *Purdew v. Jackson*, 1 Russ. 56.

ported, on the ground that a court of equity only dealt with interests in possession, and that it was not until the property came to be distributed that in ordinary cases the court enforced obligations attaching upon the property otherwise than by contract. The wife's right to a settlement out of that property which the husband at law would, if he could, take possession of in her right, was an obligation which a court of equity fastened not upon the property, but upon the right to receive it; in fine, *the wife's equity arose upon the husband's legal right to present possession*; and that, of course, could only apply when the remainder or reversion had ceased to be such, and the property had fallen into possession (a), or but for the pendency of an administration action would have been in possession (b). Or, in the language of this present book, there was no danger of the husband getting at such property, and therefore no foundation for an equity to a settlement out of it, so long as it was in its reversionary condition.

Malins's Act,  
20 & 21 Vict.,  
c. 57.  
*Feme covert's*  
interests in  
personalty,—  
(a.) Being in  
reversion.

By Malins's Act (c) every married woman might, with the concurrence of her husband, by deed acknowledged in the manner required by the Fines and Recoveries Act (d), dispose of *every future or reversionary interest*, vested or contingent, belonging to such married woman, or her husband in her right, in any personal estate to which she was entitled under any instrument (except her own marriage settlement), *made after the 31st December 1857*; she might also release or extinguish any power in regard to any such personal estate, and also release and extinguish her equity to a settlement out of *her personal property in possession* under any such instrument as aforesaid. But nothing therein contained was to extend to any

(b.) Being in  
possession.

(a) *Osborn v. Morgan*, 9 Hare, 434.

(b) *Robinson v. Robinson*, W. N. 1879, p. 100.

(c) 20 & 21 Vict., c. 57.

(d) 3 & 4 Will. IV., c. 73.

reversionary interest to which she should become entitled under any instrument by which she was restrained from alienating or affecting the same. And the powers of disposition given by the Act to a married woman were not to enable her to dispose of any interest in personal estate settled on her by any settlement or agreement for a settlement made on the occasion of her own marriage.

If the wife was entitled to any chose in action, whether legal or equitable, of a reversionary nature, not within the above-mentioned Act, the effect of an assignment by the husband was different under different circumstances. For putting aside the Married Women's Property Acts of 1870, 1874, and 1882, it is certain, firstly, that the wife by herself could not assign, for by the act of marriage she deprived herself of all power so to do; and, secondly, the husband could only assign to another the interest to which he might be entitled himself. Suppose, therefore, that the wife was entitled, on the death of A., a living person, *to a sum of stock standing in the name of trustees*, and that her husband had purported to make an assignment of this reversionary interest to B., a purchaser; the benefit which would have accrued to B., by virtue of the assignment would have varied, according as the husband, the wife, or A., the tenant for life, died first. If the husband died first, B. lost his purchase, for the wife having survived her husband, would, on the death of A., have been entitled to the stock, which had never been reduced into the possession of her husband, or of B., his assignee (*e*). If A. died first, B. would then have obtained a transfer of the stock, if the trustees had chosen to transfer it to him (*f*), and if the wife had not meanwhile taken

As to cases not within the Act,—operation of the assignment.

Three possible ways in which the assignment might result,—

(1.) If husband died before reversion fell in, purchaser lost his purchase.

(2.) If reversion fell into possession, the husband and wife living, purchaser took it subject to her equity.

(*e*) *Purdew v. Jackson*, 1 Russ. 1; *Honner v. Morton*, 3 Russ. 65.

(*f*) *Wheeler v. Caryll*, Amb. 121, 122; *Moor v. Rycault*, Prec. Ch. 22.

(3.) If wife died first, and then the reversion fell in, purchaser took all.

What amounted to reduction into possession.

Mere assignment of a reversion not a reduction into possession.

Husband's transfer of title-deeds, of which his wife was equitable mortgagee, not enough.

steps to enforce her equity to a settlement (g). But if the trustees had refused to transfer without the direction of the Court of Chancery, or if the wife had insisted upon her right, B. only took the fund after making such settlement upon her as the court thought fit. If, however, the wife died first, then this chose in action, having remained unreduced into possession, would, like a legal chose in action under the same circumstances, have remained part of the wife's personal estate; and the husband, on taking out administration to his wife (h), would have been bound by his previous assignment; and B. would accordingly, in this single event, have obtained the whole fund, subject, however, to the wife's debts, if any (i).

The question as to what amounted to a reduction into possession by the husband of his wife's choses in action was one that generally depended on the peculiar circumstances of each case. But in *Hornsby v. Lee* (j) it was held that a mere assignment of a reversionary chose in action by the husband could not be regarded either as an actual or as a constructive reduction into possession by the husband (k). It was also established, that whether the husband died in the lifetime of the person having a prior interest, whereby the chose in action *could not*, as against the wife, be reduced into possession, or whether he survived and died before it was *actually* reduced into possession, the same result followed—the chose in action survived to the wife (l). It was also held that the transfer by a husband of title-deeds, of which his wife was equitable mortgagee, to secure a debt of his own, was not a

(g) *Greedy v. Lavender*, 13 Beav. 62.

(h) 1 Bright's H. & W. 41; *Betts v. Kimpton*, 2 B. & Ad. 273.

(i) 29 Car. II., c. 3, s. 25; Wma. Pers. Prop. 396.

(j) 2 Mad. 16.

(k) *Le Vasseur v. Scrutton*, 14 Sim. 116.

(l) *Ellison v. Elwin*, 13 Sim. 309; but see *Widgery v. Tepper*, L. R. 5 Ch. Div. 516.

reduction into possession, so as to defeat the wife's right of survivorship (*m*). On the other hand, the test of reduction into possession of a sum of money was, in a recent case, declared to be the right of the husband to maintain an action at law for the amount, as money had and received to his use (*n*); and therefore, where the income of a married woman's life-estate had been ordered to be received, and applied by a receiver in a suit in payment of her husband's incumbrances, it was held that arrears of income in the receiver's hands, which had not been paid as directed, were nevertheless, by the effect of the order, reduced into possession, so as to disentitle the wife surviving to such arrears, because the receiver was to be deemed in the nature of an agent for the person entitled by virtue of the order for appropriation (*o*). And of course, payment to an agent of the husband was a reduction into possession to the extent of that payment (*p*).

Order of court to pay wife's income into a receiver's hands was a reduction into possession.

It has been already observed that the wife's equity, at least in cases where she took an absolute interest, was not for herself only, but for herself and her children, there being no instance where the settlement was not made in favour of the children at the same time; and though the wife might have waived or abandoned her equity, and thus have prevented her children obtaining any benefit from it, yet if she claimed it for herself, the court required the benefit to be extended to her children; her equity and the equity of the children were treated as one equity, to

Settlement, if made, must have been on wife and children; though she might have waived it, and thus deprived her children.

(*m*) *Mitchelmore v. Mudge*, 2 Giff. 183.

(*n*) *Aitchison v. Dixon*, L. R. 10 Eq. 589; and see *Wollaston v. Berkeley*, L. R. 2 Ch. Div. 213, where husband and wife died contemporaneously; and *In re Barber, Dardier v. Chapman*, 11 Ch. Div. 442.

(*o*) *Tidd v. Lister*, 2 W. R. 184.

(*p*) *In re Barber, Dardier v. Chapman*, W. N. 1879, 86.



be enforced or not at her option (q). In no case were the children permitted to assert an independent equity; for in all cases the equity of the wife was personal, and the court acknowledged no original title in the children, who could claim only that provision which the wife thought fit to secure for herself and them; and if the wife consented that the husband should receive the whole property, the children were deprived of all provision out of it.

When the right of children became indefeasible.

The inquiry therefore arose,—what was sufficient to create a title in the children? Before the property was impressed with a trust in her favour, it was necessary that some action should have been taken by the wife. What action was necessary upon her part to raise such a trust, or rather, how far that action must have been carried in order to raise the trust, was the question. If the property was in the hands of trustees, it was not enough that she should have given them notice, in however formal and regular a manner, that she demanded a settlement; for notwithstanding any such notice, the trustees might with impunity have handed over the property to the husband. Also, even if she had commenced an action, and had not carried her action far enough to establish the trust for herself and her children, she might, at any time before the *settlement was completed*, have waived and defeated it, not only as to her own interests, but also as to the interests of her children (r). Now the following points with reference to this doctrine were well established:—

(a.) Where wife lived,—upon complete execution of settlement.

(b.) Where wife died,—upon decree made and not sooner.

1. That if the wife died before the bill was filed, giving to the court a jurisdiction or dominion over the fund, the children had no right to require a settlement (s).

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(q) *De la Garde v. Lempriere*, 6 Beav. 344.

(r) *Wallace v. Auldjo*, 2 Drew. & Sm. 222.

(s) *Scriven v. Tapley*, 2 Eden, 337.

2. That if the wife died, even after she had filed a bill for a settlement, but before decree, her children could not sustain a bill to have a settlement made on them (t). If wife died before decree, children had no right.

3. That if a decree or order had been made by the court, referring it to the Master, under the old practice, or to a Judge in Chambers, under the new practice, to approve a proper settlement, and the wife died before anything further was done, the children were entitled to the benefit of that decree or order, and might file a bill to enforce such settlement, as the wife, if still living, would have been entitled to (u). Right of children as against husband arose on decree.

4. The children's right to have a settlement executed after the death of their mother, who had claimed her equity to a settlement, also arose where there was during the marriage a contract by the father, independently of judicial decree, to make a settlement of his wife's property (v). Yet, after such a contract, just as after judicial decree, the wife, if living, might, at any time before the *execution* of the settlement, have waived her equity, and altogether defeated her children (w). In the words of Wigram, V.C. (x), "There may be a case in which the wife is not absolutely bound, but in which, as against the husband, the children are entitled to the benefit of the mother's equity. If the husband is bound, the children are certainly entitled."

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(t) *De la Garde v. Lempriere*, 6 Beav. 344; *Lloyd v. Mason*, 5 Hare, 149; *Lloyd v. Williams*, 1 Mad. 450. And consider effect of *Fitzgerald v. Chapman*, L. R. 1 Ch. Div. 563; *Burton v. Sturgeon*, L. R. 2 Ch. Div. 318.

(u) *Wallace v. Auldjo*, 2 Drew. & Sm. 223; *Murray v. Elibank*, 1 L. C. 431; and see Judicature Acts, 1873-75, Order L., Rule 1.

(v) *Lloyd v. Williams*, 1 Mad. 450; *De la Garde v. Lempriere*, 6 Beav. 344; *Wallace v. Auldjo*, 2 Drew. & Sm. 216; and 1 De G. Jo. & Sm. 643.

(w) *Murray v. Elibank*, 1 L. C. 479; *Macaulay v. Philips*, 4 Ves. 15; *Baldwin v. Baldwin*, 5 De G. & Sm. 319.

(x) *Lloyd v. Mason*, 5 Ha. 153.

But of course a married woman, being, and so long as she was, an infant, could not have waived her equity (y).

What would defeat her right to a settlement.

The wife's right to a settlement, besides being voluntarily waived by her, might also have been defeated adversely to her by various causes, viz. :—

(1.) By husband's receipt of the fund.

1. By the receipt by the husband or his assignees of the fund (z).

(2.) Where the debts of wife, or even of husband, exceeded the fund.

2. Where the debts of the wife, contracted before marriage, for which her husband became liable, exceeded in amount the fund to which he became entitled in her right (a); and similarly where the husband's debts to the estate out of which the wife's interest arose exceeded the amount of such interest (b).

(3.) By an adequate settlement.

3. Where an adequate settlement had been made upon her (c); but not by an inadequate settlement, unless her right to a further settlement had been barred by an express stipulation before marriage (d).

(4.) By her adultery, unless husband also living in adultery.

4. Where she was living in adultery apart from her husband (e); but even then her husband would not, it seems, *while he did not maintain her*, have been entitled to receive the whole of her property (f). But where both husband and wife were living in adultery,

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(y) *Shipway v. Ball*, 16 Ch. Div. 376.

(z) *Murray v. Elibank*, 1 L. C. 471.

(a) *Bonner v. Bonner*, 17 Beav. 86; *Barnard v. Ford*, L. R. 4 Ch. App. 247.

(b) *Osborn v. Morgan*, 9 Ha. 432; *Knight v. Knight*, L. R. 18 Eq. 487; *Ward v. Ward*, 14 Ch. Div. 506.

(c) *In re Erskine's Trusts*, 1 K. & J. 302; *Spicer v. Spicer*, 24 Beav. 365; *Giacometti v. Prodgers*, L. R. 14 Eq. 253; 8 Ch. App. 338.

(d) *Salwey v. Salwey*, Amb. 692; *Garforth v. Bradley*, 2 Ves. Sr. 675.

(e) *Carr v. Eastabrooke*, 4 Ves. 146; *In re Lewin's Trust*, 20 Beav. 378.

(f) *Ball v. Montgomery*, 2 Ves. Jr. 191.

it was held that the wife might claim a settlement, upon the principle of setting off the one wrong against the other, whereby the wife was again chaste (g).

5. By her fraudulent suppression of the fact of her <sup>(5.) By her fraud.</sup> coverture. Thus, where a woman, by a document purporting to bear date before, but in reality signed after, her marriage, affected to assign certain property to her husband which he afterwards sold, it was held that, though there was evidence of coercion on the part of the husband, yet by her concurrence in his fraud she had precluded herself from claiming her equity to a settlement *as against the purchaser* (h).

When the husband was solvent, the amount to be settled upon the wife and children was a matter which depended generally on the arrangement between the husband and wife, and if the husband, being solvent, refused to make a settlement upon his wife, the court would not, because it could not, so long as he supported her, prevent his taking the produce or interest of her property, but the court would in such a case retain the capital, so as to give the wife a chance of taking it by survivorship (i); and, of course, if the husband survived, he might insist upon the court paying out the entire capital to himself. The question as to what amount should be settled upon the wife arose most frequently when the husband had become bankrupt. No general rule was laid down. It was a matter purely within the discretion of the court, to be determined according to the circumstances and merits of the case (j). The court took into consideration whether the wife had acquired any benefit out of the property

Amount of settlement.

(a.) When husband was solvent.

(b.) When husband was insolvent.

(g) *Greedy v. Lavender*, 13 Beav. 62.

(h) *In re Lush's Trusts*, L. R. 4 Ch. App. 591.

(i) *Sleech v. Thorington*, 2 Ves. Sr. 561; *Atcheson v. Atcheson*, 11 Beav. 485.

(j) *Carter v. Taggart*, 1 De G. M. & G. 289; *Aubrey v. Brown*, 4 W. R. 425.

Settlement by husband, on trustees refusing to part with the wife's property, also good.

to property which the husband could not touch, without the aid of the court, and the trustees could not pay it without the husband making a settlement; and if the husband agreed to settle it, and did that which the court would have decreed, it is a good settlement against creditors (y).

#### SECTION IV.—SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS.

Wife must not have committed a fraud on the marital right.

It having been a general rule of law that a husband became entitled to the property of his wife on marriage, any alienation of property by her in fraudulent derogation of the marital rights would in equity have been deemed null and void. In *Strathmore v. Bowes* (z), Lord Thurlow thus stated the rule:—"A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud. If a woman, *during the course of a treaty* of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *prima facie*, because affected with that fraud."

The cases decided on this subject support the following conclusions:—

If during a treaty of marriage she aliened without husband's knowledge property to which she had represented herself entitled, it was fraudulent.

1. If a woman entitled to property entered into a treaty for marriage, and *during the treaty represented to her intended husband* that she was so entitled; that upon the marriage he would become entitled *jure mariti*; and if *during the same treaty* she CLANDESTINELY conveyed away the same property to a volun-

(y) *Wheeler v. Caryl*, Amb. 121, 122; *Moor v. Rycuall*, Prec. Ch. 22; *In re Wray's Trusts*, 16 Jur. 1126.

(z) 1 L. C. 446.

teer (a), or settled the property upon herself in such a manner as to defeat the marital right, *and the concealment continued until the marriage took place*, there could be no doubt but that a fraud was practised in such a case on the husband, and he was entitled to relief (b).

2. And not only was this principle applicable where the husband knew of the existence of her property, but it was extended much further; for in *Goddard v. Snow* (c), a woman ten months before marriage, but after the commencement of that intimate acquaintance with her future husband which ripened into marriage, made a settlement of a sum of money *which he did not know her even to be possessed of*. The marriage took place, she concealing from him both her right to the money and the existence of the settlement. Ten years after, on her death, it was held, on a bill filed by the husband, that the settlement was void, as a fraud upon his marital rights (d).

Same principle applicable if he did not know her to be possessed of such property.

3. But when a woman about to marry sold or conveyed to a purchaser for valuable consideration, *without notice* of any intended derogation of the marital right, the sale or conveyance was held good (e). It was uncertain, however, whether if the purchaser for value *had notice*, the sale or conveyance would have stood as against the husband (f).

Not fraudulent if to a purchaser for valuable consideration without notice.

4. It would seem that a clandestine settlement made by a woman pending her marriage, even if meritorious in its nature, as on the children of a former marriage, or on her illegitimate children, would

Void, even though meritorious, if secret.

(a) *Lance v. Norman*, 2 Ch. Rep. 79.

(b) *England v. Downes*, 2 Beav. 528.

(c) 1 Russ. 485.

(d) *Downes v. Jennings*, 32 Beav. 290; *Taylor v. Pugh*, 1 Hare, 608.

(e) *Blanchet v. Foster*, 2 Ves. Sr. 264; *Lewellin v. Cobbold*, 1 Sm. & Giff. 376.

(f) *Ibid.*

also have been set aside as a fraud on the husband (*g*).

Marriage with notice of settlement bound husband.

5. If the intended husband was acquainted before his marriage with the fact of an assignment of property made by his intended wife, and nevertheless still thought fit to marry her, he was bound by it (*h*).

A husband could only set aside a conveyance when made pending the marriage with him.

6. In all the cases it was held that the settlement to be invalidated must have been made without the husband's knowledge, *during the course of the treaty for marriage* with HIM; and accordingly a settlement made by a widow upon herself and the children of a former marriage was not fraudulent, because it was proved that the person she afterwards married was not at the time of the settlement "her THEN intended husband" (*i*). And in *Strathmore (Countess) v. Bowes* (*j*), the plaintiff, pending a treaty of marriage with A., made a settlement of her property with his (A.'s) approbation; a few days after, B. gained her affections, and she threw over A., and married B., who had no notice of the settlement. It was, however, held good against B., as it could be no fraud on HIM, his brief period of courtship not having commenced at date.

If he had seduced her before marriage, her conveyance was good as against him.

7. Where the husband had before marriage seduced his wife, and thus rendered retirement from the marriage on her part extremely inconvenient, a settlement of her property made by the female before the marriage, although without her husband's knowledge, would have been supported (*k*).

Under the Married Women's Property Act, 1882,

(*g*) *Taylor v. Pugh*, 1 Hare, 608.

(*h*) *St. George v. Wake*, 1 My. & K. 610; *Wrigley v. Swainson*, 3 De G. & Sm. 458; *Slocombe v. Glubb*, 2 Bro. C. C. 545; but see *Nelson v. Stocker*, 4 De G. & Jo. 458.

(*i*) *England v. Downs*, 2 Beav. 531.

(*k*) *Taylor v. Pugh*, 1 Hare, 608.

(*j*) 1 L. C. 446.

above expounded, it is difficult to see how any conveyance by a woman about to marry can now be considered fraudulent, whether it be secret and voluntary or not, *scil.* as against her husband, for under that Act he has now no prospective or inchoate or other right whatever to his wife's property, and therefore, however gross the fraud upon him, it would not be a fraud producing any damage (unless under some very exceptional circumstances), and, of course, fraud without damage is not any ground of action either at law or in equity.

Married Women's Property Act, 1882,—how it affects frauds on marital rights.



## CHAPTER XXII.

## INFANTS.

Guardians. UPON the question, who may be the guardians (a) of an infant,—

Father. 1. The father is the guardian by nature and nurture  
 Mother. of his children during their infancy (b). But by the  
 ✓ statute 36 Vict., c. 12, the court may grant the custody of infants under the age of sixteen years to the mother, *where that is for the benefit of the infant.*

Testamentary guardian. 2. By the statute 12 Car. II., c. 24, the father, even though a minor, may by deed, and if not a minor, may by deed or will, appoint a guardian for his legitimate children; and guardians so appointed are usually called testamentary guardians (c), and such testamentary  
 X guardians are trustees, and the Statute of Limitations is inapplicable to accounts as between them and their ward (d).

Guardian appointed by stranger standing in loco parentis. 3. The father may waive his natural rights of guardianship in favour of a stranger, whom he has permitted to put himself *in loco parentis* towards his child. Where, therefore, under these circumstances, the stranger *has provided* for the maintenance and education of the child, and has appointed guardians, the father will be restrained in equity from asserting

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(a) For the various kinds of guardians, ancient and modern, see Brown's Dictionary, title *Guardian*.

(b) *Wellesley v. Beaufort*, 2 Russ. 21.

(c) 1 Vict., c. 26.

(d) *Mathew v. Brise*, 14 Beav. 341.

his parental rights *to the prejudice of his child's future interests* (e).

4. The court may appoint a guardian. The origin of the jurisdiction in Chancery to appoint a guardian over infants is to be found in the prerogative of the Crown, which is under a general duty as *parens patriæ*, and has a corresponding power, to protect those who have no other lawful protector (f); and the jurisdiction is exercised in Chancery, as a branch of the *general jurisdiction* originally confided in and delegated to that court, this jurisdiction not belonging to the Lord Chancellor alone, as holder of the Great Seal and Keeper of the Royal conscience, but being also exercisable by the Master of the Rolls; and an appeal lies to the House of Lords from the decision of the Chancery, and not (as in the case of lunatics) to the Privy Council.

Guardian appointed by court.

Jurisdiction,—nature and origin of.

If an action is commenced relative to an infant's estate or person, the infant, whether plaintiff or defendant, and even during the life of its father or of its testamentary guardian, immediately thereupon becomes a ward of court (g); and even where an order for maintenance has been made on summons at Chambers, the infant thereby becomes a ward of court (h); and so also upon an order being made on petition under the Custody of Infants Act, 1873 (i). But in all these cases the infant must (as an almost invariable rule) have or be entitled to some property before he can be made a ward of court. "It is not, however," as observed

Infant becomes a ward of court when bill is filed relative to his estate;

Or an order made without suit.

Infant must have property that court may exercise its jurisdiction usefully.

(e) *Powel v. Cleaver*, 2 Bro. C. C. 499; *Andrews v. Salt*, L. R. 8 Ch. 622. But see *In re Agar-Ellis*, 10 Ch. Div. 49.

(f) *De Manneville v. De Manneville*, 10 Ves. 63; and see *In re Johnson's Infants*, 8 Ch. Div. 1.

(g) *Butler v. Freeman*, Amb. 303; *De Pereda v. De Mancha*, 19 Ch. Div. 451.

(h) *In re Graham*, L. R. 10 Eq. 530; *In re Hodge's Settlement*, 3 K. & J. 213.

(i) 36 & 37 Vict., c. 12; see *In re Taylor*, L. R. 4 Ch. Div. 157.

by Lord Eldon, "from any want of jurisdiction in the court that it does not act where the infant has no property, but from a want of the means to exercise its jurisdiction, because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so—that is to say, by its having the means of applying property for the use and maintenance of the infant (*j*).

Jurisdiction  
over  
guardians.

In general, parents are intrusted with the custody and education of their children, on the natural presumption that the children will by their parents be properly treated, and that due care will be taken of their education, morals, and religion; but if the court has reasonable grounds for believing that the children would not be properly treated, it "would interfere even with parents, upon the principle that *preventing* justice is preferable to *punishing* injustice" (*k*). But the court requires a strong case to be made out before it will interfere with a father's guardianship. Accordingly, where the father is insolvent (*l*), or his character and conduct are such as are likely to contaminate the morals of his children (*m*), or where he is endangering their property or neglecting their education (*n*), or is guilty of ill-treatment and cruelty to them (*o*), it is not a matter of course to take the father's guardianship away, but if the danger to the children is proximate and serious, then the custody of the children will be committed to a person to act as guardian (*p*).

When father  
loses his  
guardianship.

The guardian will be allowed to regulate the mode

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- (*j*) *Wellesley v. Beaufort*, 2 Russ. 21; and see *In re Spence*, 2 Phil. 247.
  - (*k*) *Wellesley v. Beaufort*, 2 Russ. 21; *In re Besant*, 11 Ch. Div. 508.
  - (*l*) *Kiffin v. Kiffin*, 1 P. W. 705.
  - (*m*) *Shelley v. Westbrook*, Jac. 266 n.
  - (*n*) *Cruze v. Hunter*, 2 Cox. 242.
  - (*o*) *Whitfield v. Hale*, 12 Ves. 492.
  - (*p*) *Ex parte Mountford*, 15 Ves. 445; 36 Vict., c. 12.

of, and to select the place for, the education of his ward, whose obedience will be enforced by the court (g). And the court will aid guardians in obtaining possession of the persons of their wards when they are detained from them.

Guardian selects mode and place of education of his ward.

X If the guardian wishes to take his ward out of the jurisdiction of the court, and in some other cases where there is danger of injury to the ward's person or property, the court will always take security from the guardian before sanctioning his removal out of the jurisdiction (r); and the guardian also in general undertakes to bring the ward back again within the jurisdiction, if and whenever the court may require him to do so.

When guardian gives security.

Guardians will not ordinarily be permitted to change the personal property of an infant into real property, or the real property into personalty, and that for two reasons, namely, such a conversion may not only affect the rights of the infant himself, but it might also, if he should die under age, have affected at one time the rights of his representatives; for it must be remembered that before the passing of the Wills Act (s), an infant might have disposed of personal property before he attained the age of twenty-one, but could not have devised real property until he had attained that age (t); and such change might still, of course, if it were permitted without restriction, affect the relative rights of the real and personal representa-

Guardians must not change character of ward's property.

(g) *Hall v. Hall*, 3 Atk. 721. See *Tremain's Case*, 1 Str. 167, where, "being an infant, he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge, and the court sent a messenger to carry him from Oxford to Cambridge; and upon returning to Oxford, there went another, *iam* to carry him to Cambridge, *quam* to keep him there.

(r) *Jeffreys v. Vantestwarth*, Barn. Ch. R. 141; *Biggs v. Terry*, 1 My. & Cr. 675.

(s) 1 Vict., c. 26.

(t) *Ex parte Phillips*, 19 Ves. 122; *Sergeson v. Sealey*, 2 Atk. 413; *Ware v. Polhill*, 11 Ves. 278.

Except where necessary for his benefit.

Representatives who would have taken before the change, still take after the change, but only if infant dies under age.

tives of the infant. But guardians may, under peculiar circumstances, and where it is manifestly for the benefit of the infant (*u*), change the nature of the estate; as for necessary expenses, such as repairs (*v*), or by payment of a certain sum out of the personal estate of the infant, in pursuance of a condition imposed on a devise of an estate to him (*w*); and the court will support their conduct if the act be such as the court would itself have done under the like circumstances, by its own order (*x*). And although there is no equity in these cases of conversion between the representatives of the infant, nevertheless, it is the constant rule of courts of equity to hold lands purchased by the guardian with the infant's personal estate, or with the rents and profits of his real estate, to be personalty, and distributable as such; and, on the other hand, to treat real property turned into money (as, for example, timber cut down on an infant's fee-simple estate) as still retaining its original character of real estate, but in each case, only *in the event of the death of the infant before he arrives of age*. And when the court directs any such change of property, it directs the new investment to be in trust (*but only in case the infant should die under twenty-one*) for the benefit of those who would be entitled to it, if it had remained in its original state (*y*). On the other hand, *if the infant attains twenty-one*, although he should die the next day, his representatives must take his property according to its actual condition at the time of the death of the once infant.

In the case of wards of court, whether male or

(*u*) *Camden (Marquess) v. Murray*, 16 Ch. Div. 161.

(*v*) *Ex parte Grimstone*, 4 Bro. C. C. note, 235; Amb. 708.

(*w*) *Vernon v. Vernon*, cited 1 Ves. Jr. 456.

(*x*) *Ex parte Phillips*, 19 Ves. 122; and compare *Steed v. Preece*, L. R. 18 Eq. 182.

(*y*) *Ware v. Polhill*, 11 Ves. 278; *Foster v. Foster*, L. R. 1 Ch. Div. 588.

female, even when they have parents living or guardians, it is necessary to apply to obtain the permission of the court before their marriage can take place (z). If a man should marry a female ward, or if a woman should marry a male ward, without the consent and approbation of the court, he or she, and all others concerned in aiding and abetting the act, will be guilty of contempt of court, and may be punished by imprisonment (a). Although the husband or wife, or those contriving and assisting at the marriage, are not aware of the fact that the infant is a ward of court, their ignorance will not be sufficient to acquit them of contempt of court, although it may weigh in determining the severity of their punishment (b). With a view also to prevent the improper marriages of its wards, the guardian on his appointment is generally required to give a recognisance that the infant shall not marry without the leave of the court; so that if an infant should marry, though without the privity, knowledge, or negligence of the guardian, yet the recognisance would in strictness be forfeited, whatever favour the court might, upon an application, think fit to extend to the guardian when he should appear to have been in no active fault (c). Also, and with the same view, the court will, where there is reason to suspect an improper marriage being contemplated without its sanction, by an injunction not only interdict the marriage, but also interdict communications between the ward and his or her professing admirer (d); and if the guardian is suspected of any connivance, it will remove the infant from his care and custody, and commit the ward to the care of others (e).

Marriage of ward of court must be with its permission. Conniving at marriage of ward without consent of court, a contempt.

Guardian must give recognisance that ward shall not marry without consent.

Improper marriage restrained by injunction.

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(z) *Smith v. Smith*, 3 Atk. 305.  
 (a) *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Ex parte Mitchell*, 2 Atk. 173.  
 (b) *More v. More*, 2 Atk. 157; *Herbert's Case*, 3 P. W. 116.  
 (c) *Eyre v. Countess of Shaftesbury*, 2 L. C. 633.  
 (d) *Lord Raymond's Case*, Cas. t. Talb. 58; *Pearce v. Crutchfield*, 14 Ves. 206.  
 (e) *Tombes v. Elers*, Dick, 88.

Settlement  
must be ap-  
proved by  
court.

Considera-  
tions on a  
settlement.

In case of a ward being about to marry, the court generally refers it to Chambers to ascertain and report whether the match is a suitable one, and also what settlement ought to be made (*f*), this reference being usually made upon petition. And even where a marriage has been actually celebrated without the sanction of the court, the court will not discharge a husband committed for contempt until he has made such a settlement upon the female ward as, upon a reference to Chambers, shall, under all the circumstances, be deemed equitable and proper, the nature of the settlement depending of course in a great measure upon the fortune, position, and conduct of the husband, *e.g.*, according as the parties are of about equal rank and fortune, or the husband's position is such as leads to a suspicion of mercenary motives on his part (*g*).

Settlement  
under Mar-  
riage Act,  
4 Geo. IV.,  
c. 76.

Under the Marriage Act, 4 Geo. IV., c. 76, the guardian of any minor who has married without his consent may, on information filed, obtain a declaration of forfeiture against either party who has procured the solemnisation of the marriage by falsely stating that such consent had been given, and the court will thereupon decree a settlement on the innocent party or the issue of the marriage (*h*).

Binding settle-  
ments by in-  
fants, under  
18 & 19 Vict.,  
c. 43.

Under the Infants' Settlement Act, 18 & 19 Vict., c. 43 (explained by 23 & 24 Vict., c. 83), an infant, not being under twenty years of age if a male, or seventeen years if a female, is enabled, with the approbation of the Court of Chancery, to make a binding settlement on marriage of his or her real and personal

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(*f*) *Smith v. Smith*, 3 Atk. 305; *Leeds v. Barnardiston*, 4 Sim. 538.  
(*g*) *Ball v. Coutts*, 1 V. & B. 303; *Field v. Moore*, 7 De G. M. & G. 691.

(*h*) See 19 & 20 Vict., c. 119, s. 19; *Att.-Gen. v. Read*, L. R. 12 Eq. 38; *Dan. Ch. Pr.* 10-12.

estate, whether in possession, reversion, remainder, or expectancy (i).

Even if the person who was once a ward should have since come of age, and should be ready to waive his or her settlement, the court (if it can find any remaining ground for contriving to exercise its jurisdiction) will protect the ward against his or her own indiscretion, and the undue influence of the other party (j).

Waiver by ward of her settlement.

A father being bound to maintain his children, will not usually have any allowance out of their property for that purpose, not even out of a provision for their maintenance (k); but where the father is not able to give his child an education *suitable to the fortune which the child expects*, in that case maintenance will be allowed (l). A wife was formerly under no legal obligation to maintain her children (m); but under the Married Women's Property Act, 1870 (n), and under the Married Women's Property Act, 1882 (o), if possessed of separate property, she was and is rendered liable to contribute to their maintenance to a limited extent, but only in case the husband was and is unable to maintain them; also, if there is a *contract* on marriage amounting to a trust, that a particular property SHALL be applied for the maintenance and education of the children, that property must be applied accordingly, without reference to the ability or inability of the father to maintain and educate them (p).

Father bound to maintain his children, though there is a provision for maintenance, except when he is prevented by poverty. A wife liable under 33 & 34 Vict., c. 93.

When father is entitled to an allowance.

(i) *Re Olive*, 11 W. R. 819; *Barrow v. Barrow*, 4 K. & J. 418; *Simson v. Jones*, 2 Russ. & My. 365; and disting. *Kingsman v. Kingsman*, 6 Q. B. D. 122; and see *Ex parte Jones*, in *re Jones*, 18 Ch. Div. 109.

(j) *Hobson v. Ferraby*, 2 Coll. 412; *Long v. Long*, 2 Sim. & St. 119.

(k) *Stocken v. Stocken*, 4 My. & Cr. 98; *Meacher v. Young*, 2 My. & K. 490. See also *Ransome v. Burgess*, L. R. 3 Eq. 773.

(l) *Buckworth v. Buckworth*, 1 Cox. 81; *In re Allan, Havelock v. Havelock*, 17 Ch. Div. 807; *In re Colgate Infants*, 19 Ch. Div. 305.

(m) *Hodgens v. Hodgens*, 4 C. & F. 323.

(n) 33 & 34 Vict., c. 93, s. 14.

(o) 45 & 46 Vict., c. 75.

(p) *Thompson v. Griffin*, 1 Cr. & Ph. 317, 320.



How allowance is regulated.

In allowing maintenance for an infant, regard will be had (as in the case of lunatics) to the state and condition of his family. Thus, where there are younger children, especially if they are numerous and totally destitute, the court will make a liberal allowance to the eldest son, that he may be the better able to maintain his brothers and sisters (*q*). And a liberal allowance will also sometimes be made for infants, in order to relieve or assist their parents when in distressed circumstances (*r*). In all such cases, it is the infant's benefit again which is alone considered; although the benefit which he derives in these cases is indirect and merely of a social and moral kind.

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(*q*) *Pierpoint v. Cheney*, 1 P. Wms. 488; *Bradshaw v. Bradshaw*, 1 J. & W. 647.

(*r*) *Heysham v. Heysham*, 1 Cox. 179; and see *Brown v. Smith*, 10 Ch. Div. 377; *In re Roper's Trusts*, 11 Ch. Div. 272.

## CHAPTER XXIII.

## LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND.

It is to be stated here at the outset that unsoundness of mind in itself gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is by law the guardian of infants, whom (as we have seen) it makes its wards; but it is not the curator of the person or of the estate of a person *non compos mentis*. And if the Court of Chancery in any case entertains proceedings affecting a person *non compos mentis*, it assumes the jurisdiction upon some ground independent of the unsoundness of mind, that is to say, upon such or the like grounds as it would think sufficient at the suit of the person himself if of sound mind, *e.g.*, upon the ground of a trust, or of a partnership, or such like (a).

Unsoundness of mind is no ground for jurisdiction in equity.

Clearly, therefore, it would be an error to suppose that the Court of Chancery, as such, has jurisdiction in lunacy; nor is any encouragement given to that error in the history of the jurisdiction of the court, as stated in Part i., Chapter i., of this Hand-book. It was there stated that the Court of Chancery, as a permanent tribunal, originated in 22 Edward III. by an ordinance of that king and in that year; but already long before that date the jurisdiction in lunacy was already in existence, and was at that time vested in the Court of

The jurisdiction was in the Exchequer, upon inquisition.

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(a) *Beall v. Smith*, L. R. 9 Ch. App. 85; *In re Edwards, M'Neile v. Chambers*, 10 Ch. Div. 605; *In re Currie*, 10 Ch. Div. 93. But see *Vane v. Vane*, L. R. 2 Ch. Div. 124, commented on *In re Bligh*, 12 Ch. Div. 364; and see *Lillingston v. Pures*, 12 Ch. Div. 333; *In re Brandon's Trusts*, 13 Ch. Div. 773.

Because a  
matter of  
revenue.

1 X Exchequer (b), that court having special care of the Crown's prerogative in the matter of revenue, of which lunacy and idiocy were sources. This prerogative of the Crown was subsequently defined in the Statute of Prerogatives (c), the 9th chapter of that statute relating to idiots, and the 10th chapter relating to lunatics. Under these two chapters of that statute, the Crown acquired (in effect) the management of the estates of idiots and of lunatics, subject to the duty of maintaining the idiot or lunatic, as the case might be, during all the period of the mental incapacity, and rendering up the same estates to the representatives of the idiot upon his death and to the lunatic himself (upon his recovery), or to his representatives in like manner upon his death. There was practically little distinction in the Crown's management of the estates, whether of idiots or of lunatics, and the distinction (so far as any existed) has long since ceased. And at the present day, whatever is stated of lunacy is commonly intended (as in the residue of this present chapter) of both lunatics and idiots indifferently, including also all persons whatsoever of unsound mind so found by inquisition.

Exchequer  
jurisdiction in  
lunacy trans-  
ferred to Lord  
Chancellor.

Y X The jurisdiction of the Court of Exchequer in lunacy was very early superseded, and the jurisdiction was subsequently vested in divers courts and in divers officials, not profitable to specify here; but eventually the practice became a constant one of the Crown to delegate the care and custody of lunatics and of their estates to the Lord Chancellor, not as being the President of the Court of Chancery, but as being an executive officer of the highest standing in the realm and enjoying the most intimate personal relations with the Crown. The accident that he was also a great judicial officer, head of the Court of Chancery, and competent as an adviser in matters of law and equity affecting, or

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(b) Mem. Scacc. Trin. 19 Edw. I.

(c) 17 Edw. II.

which might possibly affect, the lunatic as regarded his property and even his person, was a reason not without its own weight, which probably helped to permanently fix the jurisdiction in lunacy in the President of the Chancery Court. The convenience of the conjunction is in many ways felt at the present day, as will appear hereunder. X

Shortly after the appointment of the Lords Justices in 1851 (*d*), as a court of appeal in Chancery, with all the original and other jurisdiction of the Lord Chancellor in the Court of Chancery (s. 5), a warrant was made out to each of them under the Queen's sign manual, intrusting them with the care and custody of lunatics; and under the Lunacy Regulation Act, 1853 (*e*), the jurisdiction of the Lords Justices in lunacy was continued, concurrently with that of the Lord Chancellor; and upon the coming into operation of the Judicature Acts, 1873-75, when the Lords Justices became a mere limb of the new Court of Appeal, and were therefore indirectly deprived of all original jurisdiction in the Chancery division of the High Court, they were appointed, by virtue, apparently, of sect. 51 of the Judicature Act, 1873, additional judges of the High Court of Justice, for the purpose of more effectively exercising their jurisdiction in lunacy (*f*), so as to possess and be able to exercise all that original jurisdiction of Chancery that was ancillary to the jurisdiction in lunacy (*g*). But the aforesaid combination of a limited Chancery jurisdiction with the lunacy jurisdiction proper has not altered the character nor reduced the extent of the lunacy jurisdiction, from which therefore, as heretofore, the appeal lies not to the House of Lords (as it would from Chancery proper) but

Lords Justices in Chancery, concurrently with, and in aid of, Lord Chancellor, acquired the jurisdiction, and now exercise it.

(*d*) 14 & 15 Vict., c. 83.

(*e*) 16 & 17 Vict., c. 70.

(*f*) *Re Lamotte*, L. R. 4 Ch. Div. 325.

(*g*) *In re T—*, 15 Ch. Div. 78; *In re Tate*, 20 Ch. Div. 135; *In re Watson*, 19 Ch. Div. 384.

to the Judicial Committee of Her Majesty's Privy Council (*h*).

*Beall v. Smith*,  
—what proceedings in  
Chancery would be a  
contempt on  
the lunacy  
jurisdiction.

The recent case of *Beall v. Smith* (*i*) affords a striking illustration of the several jurisdictions in Chancery and in lunacy. There the plaintiff having become of unsound mind, a bill was filed in his name by a next friend for the purpose of winding up the business in which he had been engaged; a receiver was appointed, and a decree directing accounts was taken. The plaintiff's family were not consulted in the institution of the suit, and were opposed to its further prosecution. Nevertheless, an order on further consideration was made, and the costs of the suit taxed and paid out of the estate. Pending the suit, application was made in lunacy, and an inquisition having been issued, and verdict finding the lunacy obtained, a committee was appointed of the plaintiff's estate. It having then been discovered that further proceedings had been taken in the suit, a petition was presented by the lunatic and his committee for a declaration that the same were void; and on appeal to the Lords Justices, it was ordered that all proceedings in the suit, subsequent to the appointment of the receiver, should be set aside, with costs to be paid by the plaintiff's solicitor; the court expressing an opinion that all the proceedings after the inquisition were a gross contempt on the jurisdiction in lunacy.

Equity exercises its jurisdiction in spite of the unsoundness of mind, and only where no inquisition.

The Lord Justice James thus stated the principles which regulate the court in the exercise of its jurisdiction in cases of persons of unsound mind not so found by inquisition: "It is to be borne in mind that unsoundness of mind gives the Court of Chancery no jurisdiction whatever. The Court of Chancery is not

(*h*) *Grosvenor v. Draz*, 2 Knapp. 82; Judicature Act, 1873, s. 18, suspended by Judicature Act, 1875, s. 2, till Nov. 1, 1876, and now apparently suspended altogether.

(*i*) L. R. 9 Ch. 85.

the curator either of the person or the estate of a person of unsound mind, whom it does not and cannot make its ward. It is *not by reason of the incompetency, but notwithstanding the incompetency*, that the Court of Chancery entertains the proceedings. It can no more take upon itself the management or disposition of a lunatic's property, than it can the management or disposition of the property of a person abroad or confined to his bed by illness. The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind" (j).

And further, in his judgment in the last-mentioned case, the same Lord Justice further stated, that the committee appointed over the person and estate of a lunatic is only an officer of the Court of Lunacy, that court being only the delegate of the Crown's prerogative; and that it was because in that way the Crown, by its proper tribunal, had the lunatic and all his affairs under its exclusive care and protection, that the power of any other person to commence or to prosecute any proceedings for his protection was taken away. Application can at all times be made to the Court in Lunacy by the lunatic's committee for the court's sanction as to anything that may require to be done, and that court may direct proceedings in the High Court. And for the better guidance of the committee, the Lunacy Regulation Act, 1853, before mentioned, in its 108th and following sections, contains various directions and authorities to the committee regarding the management and administration of the lunatic's estate, and making reports thereof to the Court of Lunacy or its proper officers, the Masters (k); and where the entire estate of the lunatic is under £1000, now £2000 (l),

Or, if an  
inquisition,  
then only by  
direction of  
the Court in  
Lunacy.

(j) See also *Jones v. Lloyd*, 22 W. R. 787; *Vane v. Vane*, L. R. 2 Ch. 124.

(k) *In re Meares*, 10 Ch. Div. 552.

(l) Lunacy Regulation Act, 1882 (45 & 46 Vict., c. 82).

the jurisdiction is summary (*m*); but a certificate of the fitness of the proposed committee must in all cases be produced (*n*).

Lunatic's maintenance, —allowance for, how regulated.

Regarding the maintenance and support of the lunatic, the court acts very much according to its own discretion, having regard to the magnitude of the estate and to the position and necessities of the lunatic; and (as in the case of infants) the court will (and not unfrequently does) make an allowance designed to benefit directly the near relatives of the lunatic, and in that way indirectly (by their society and otherwise) benefiting the lunatic himself (*o*). And in one case, where a lunatic advanced in years was tenant for life with remainder in tail to his nephew, the court, upon the nephew's petition, directed an allowance of £500 per annum to be made to him out of the surplus income of the lunatic, after providing for the lunatic's maintenance, but upon the terms of the petitioner charging the estate with the repayment of the sums received, the Lords Justices, as protector of the settlement, consenting to the estate-tail being barred to the extent of letting in such charge (*p*).

Conversion of lunatic's estate.

His interest alone consulted.

In the case of a lunatic, the court will not generally alter the state of the lunatic's property so as to affect the rights of his representatives, unless where it is for the benefit of the lunatic himself. "The general object of attention in the administration is solely and entirely *the interest of the lunatic himself*, without looking to the interests of those who upon his death may have an eventual right of succession. Accordingly in such a case, where the conversion is made by the

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(*m*) *Re Faircloth*, 13 Ch. Div. 307.

(*n*) *In re Brudre*, 17 Ch. Div. 775.

(*o*) *In re Weld*, 46 L. T. N. S. 397.

(*p*) *In re Sparrow*, 20 Ch. Div. 320. And see *In re Weld*, 20 Ch. Div. 451.

direction of a court of competent jurisdiction in lunacy, as there are no equities between the heir and the next of kin, they will take the properties to which they are respectively entitled according to the actual character in which they find them" (q).

His representatives have no equities between them. They take the fund in the character in which it is actually found.

(q) *Oxenden v. Compton*, 2 Ves. Jr. 72; *Ex parte Phillips*, 19 Ves. 118; *Re Leeming*, 7 Jur. N.S. 115; 3 De G. F. & Jo. 43; *In re Wharton*, 5 De G. M. & G. 33; 16 & 17 Vict., c. 70, s. 119. And compare decision in *Steed v. Preece*, 22 W. R. 432; and see *In re H. D. Ryder*, 20 Ch. Div. 514; *In re Barker*, 17 Ch. Div. 241.

General Assignment  
 of the whole of the property  
 of the said assignor  
 in the hands of the assignee



## CHAPTER I.

## ACCIDENT.

**Accident.** By the term accident is intended in equity, not any inevitable casualty or act of Providence, or *vis major*, i.e., irresistible force, but any unforeseen event, misfortune, loss, act, or omission which is not the result of negligence or misconduct in the party. For example, if an annuity is directed by a will to be secured by public stock, and an investment is accordingly made sufficient at the time for the purpose, but afterwards the stock is reduced by Act of Parliament, so that it becomes insufficient, equity will relieve the executor from all liability therefor as an accident, although it may decree the deficiency to be made up against the residuary legatees (a).

**Reduction of Government stock.**

**To give equity jurisdiction, there must be no complete legal remedy, and the party must have a conscientious title to relief.** But it is not every case of accident which will justify the interposition of a court of equity (b). The jurisdiction being concurrent, will be maintained only, first, when a court of law cannot and could not grant suitable relief; and secondly, when the party has a conscientious title to relief. For it is certain that in some cases of accidents, courts of law can and always could afford adequate relief, as in cases of "loss of deeds, mistakes in receipts and payments, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies" (c).

(a) *Davies v. Wattier*, 1 Sm. & St. 463; *May v. Bennett*, 1 Russ. 370; St. 93.

(b) *Whitfield v. Fausset*, 1 Ves. Sr. 392.

(c) 3 Bl. Com. 431.

The first consideration, then, is whether there is and always was an adequate remedy at law? not merely whether there is some remedy at law. In modern times, courts of law frequently interfere and grant a remedy, under circumstances in which it would certainly have been denied by these same courts in earlier periods; and sometimes the Legislature, by express enactments, has conferred on courts of law the same remedial faculty which belongs to courts of equity; but it is a well-established rule, that, if the courts of equity originally obtained and exercised jurisdiction, that jurisdiction is not affected merely by the circumstance that the common law courts have subsequently had conferred upon them a like power to deal with the same subject-matter. "It does not follow, because the court of law will give relief, that this court loses the concurrent jurisdiction which it always had" (d).

Is there an adequate remedy at law?

Courts of equity do not lose their jurisdiction because the common law courts have subsequently acquired it also.

I. The cases in which equity will give relief against accident fall conveniently into three groups, viz., the following:—

I. Cases in which equity relieves against accident.

- (1.) Cases of lost and destroyed documents;
- (2.) Cases of the imperfect execution of powers; and,
- (3.) Cases of erroneous payments.

In the first of these three groups of cases, one of the most common interpositions of equity is in the case of bonds or other instruments under seal which have been *lost*. Until a very recent period, the doctrine prevailed that there could be no remedy on a *lost* bond in a court of common law, because there could be no *profert* or production of the instrument in court, in order that the defendant might demand *oyer* of it—that is, that it

First group of cases,—lost and destroyed documents. (1.) Bonds, &c. being lost.

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(d) *Atkinson v. Leonard*, 3 Bro. C. C. 222; *British Empire Shipping Co. v. Somerset*, 3 K. & J. 437.

should be produced and read in open court (*e*). At present, however, the courts of law do entertain the jurisdiction, and dispense with the *profert*, if an allegation of loss, by time and accident, is stated in the declaration (*f*). But this circumstance is not permitted in the slightest degree to change the course in equity (*g*).

Equity can grant relief by requiring an indemnity which a court of law cannot do.

The original ground, therefore, of granting the relief was the supposed inability of a court of law to afford it in a suitable manner, from the impossibility of making a *profert*; but, independently of that ground for the original interference of equity, there was another satisfactory reason for the continuance of that interference, notwithstanding that courts of common law had jurisdiction over the subject-matter. A court of equity alone could give a complete remedy, with all the fit limitations which justice required, by granting relief only upon the condition that the plaintiff who sought its aid should give, if necessary, a suitable bond of indemnity. Now a court of law was incompetent to require such a bond of indemnity as a part of its judgment, although it has sometimes attempted an analogous relief by requiring the previous offer of such an indemnity. But such an offer might in many cases fall far short of the just relief; for in the intermediate time there might be a great change in the circumstances of the parties to the bond of indemnity (*h*).

Where discovery is sought, no affidavit necessary, unless relief also is asked.

There used to be an important distinction of procedure between cases where a plaintiff, alleging the loss of a bond, sought discovery merely, and cases

(*e*) The old practice of *profert* and *oyer* is abolished by the C. L. P. Act of 1852, s. 55; and see *Walmley v. Child*, 1 Ves. Sr. 344.

(*f*) *Read v. Brookman*, 3 T. R. 151; *Duffield v. Elwes*, 1 Bligh, N.S. 543.

(*g*) *Kemp v. Pryor*, 7 Ves. 246, 250.

(*h*) See *England v. Tredegar*, L. R. 1 Eq. 622; and see *East India Co. v. Boddam*, 9 Ves. 467; *Ex parte Greenaway*, 6 Ves. 812.

where he prayed also for relief. Where discovery only, and not relief, was the object of the bill, there equity would grant the discovery without any affidavit of the loss, and without any offer of indemnity; but equity entertained a suit for relief only upon the party making an affidavit of the loss and offering an indemnity, *scil.* because in all such cases an affidavit was required, to prevent abuse of the process of the court (i).

At the present day, there cannot be (or can hardly be) any case of an action in equity regarding a *lost* bond for discovery only; and therefore the action being for relief, the affidavit of loss and the offer of indemnity will in all cases now be required.

As regards lost title-deeds, the loss was not of itself a ground to come into a court of equity for relief; for if there was no more in the case, a court of law might have afforded relief by admitting evidence of the loss, just as a court of equity would do (j), and upon proof of such loss by receiving secondary evidence of the contents of the deed, and (if necessary) of its validity also. To enable the party, therefore, in case of a lost title-deed, to come into equity for relief, he must have established that there was no remedy at all at law, or no remedy which was adequate and adapted to the circumstances of his case. Thus, he might have come into equity when a title-deed either had been destroyed, or else (he knew not which) concealed by the defendant; for in that case a court of equity would decree, and a court of law could not decree, that the plaintiff should hold and enjoy the land until the defendant should produce the deed or admit its destruction (k). So, if a deed concerning land was lost, and the party

(2.) Title-deeds being lost.

(i) *Walmesley v. Child*, 1 Ves. Sr. 334.  
(j) *Whitfield v. Fausset*, 1 Ves. Sr. 392.

(k) *Ibid.*

in possession prayed discovery, and to be established in his possession under it, equity would relieve, for no remedy in such a case lay at law (*l*); and even where the plaintiff was out of possession, there were cases in which equity would interfere upon lost or suppressed title-deeds, and would decree possession to the plaintiff; but in all such cases there must have been other equities calling for the action of the court (*m*). And generally the bill must always have laid some ground besides the mere loss of a title-deed, or other sealed instrument, to justify a prayer for relief,—as that the loss obstructed the right of the plaintiff at law, or left him exposed to undue perils in the future assertion of such right. And the like special grounds would still be necessary in such cases, and for obvious reasons, to found the equity jurisdiction.

(3.) Negotiable instruments being lost.

With reference to lost bills of exchange and other negotiable instruments, it was, after some conflict of authority, decided, that if a bill, note, or cheque, negotiable either by endorsement and delivery, or by delivery only, was lost, no action would lie at the suit of the loser against any one of the parties to the instrument, either on the bill or note itself, or on the consideration (*n*); and the law was the same though the bill had never been endorsed (*o*). In this case, therefore, the proper remedy was in equity, not only on the ground of there being no remedy at law, but also on account of the power equity possessed of compelling the plaintiff to give a proper indemnity to the defendant. And the jurisdiction of equity over such cases of lost bills was not taken away by the 17 & 18 Vict., c. 125, s. 87, which enacts, that in case of any action founded upon a bill of exchange or other

(*l*) *Dalston v. Coatsworth*, 1 P. Wms. 731.

(*m*) *Dormer v. Portescue*, 3 Atk. 132.

(*n*) *Hansard v. Robinson*, 7 B. & C. 90; *Crowe v. Clay*, 9 Exch. 604.

(*o*) *Ramuz v. Crowe*, 1 Exch. 167.

negotiable instrument, the court of common law has power to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court against the claims of any other person upon such negotiable instrument (*p*).

It seems to be doubtful whether or not, if a bill or note *not negotiable* be lost, an action will lie at law on the bill, or (failing that) on the consideration (*q*); in equity, however, such a security may be assigned, and therefore an indemnity would be justly demandable, and this gives to equity sufficient ground for assuming the jurisdiction. (4.) Non-negotiable instruments being lost.

As to DESTROYED *negotiable* instruments, the weight of authority seems to support the conclusion that at common law, by the custom of merchants, the holder suing on the bill or note must, on payment, deliver up the bill or note, and cannot recover unless he do so, and he cannot do so when the instrument has been destroyed; but that he may in such a case recover on the original consideration, and that is enough (*r*). Also in the case of *Wright v. Maidstone* (*s*), Wood, V.C., held that courts of equity have never acquired jurisdiction to give relief on account of the *destruction* of a bill of exchange, because there was a complete remedy in such cases at law. With regard to DESTROYED *non-negotiable* instruments, the rule is the same as for negotiable instruments when destroyed (*t*). (5.) Negotiable and non-negotiable instruments being destroyed.

It is a general rule that the *non-execution* of a mere power will not be aided in equity (*u*). But the rule Second group of cases, —  
(1.) Defective execution of powers, being powers simply.

(*p*) *King v. Timmerman*, L. R. 6 C. P. 466.

(*q*) *Byles on Bills*, 374.

(*r*) *Hansard v. Robinson*, 7 B. & C. 95; *Byles on Bills*, 373.

(*s*) 1 K. & J. 708.

(*t*) *Byles on Bills*, 372.

(*u*) *Arundell v. Phillpot*, 2 Vern. 69; *Bull v. Vardy*, 1 Ves. Jr. 272.

is different where there is a defective execution of a power, resulting either from accident, mistake, or both, and also in regard to agreements to execute powers which may generally be deemed a species of defective execution (*v*). Equity will relieve in such cases against the defective execution of a power, but only in favour of certain persons who are regarded by a court of equity with peculiar favour, and where there are no opposing equities in the case. The aid of equity will be afforded (1) to a purchaser (*w*), which term includes a mortgagee and a lessee (*x*); (2) to a creditor (*y*); (3) to a wife (*z*); (4) to a legitimate child (*a*), for wives and children are in some degree considered as creditors by nature (*b*); and (5) to a charity (*c*). But it has been decided that a defective execution will not be aided in favour of the donee of the power (*d*), nor of a husband (*e*), nor of a natural child (*f*), nor of a grandchild (*g*), nor of remote relations, much less of volunteers (*h*); and, in fact, in favour of no others than the five favoured classes of persons above enumerated.

What defects  
in the execu-  
tion of a power  
are aided.

As to the defects which will be aided, they may generally be said to be any which are not of the very essence and substance of the power. Thus, a defect by executing the power by will when it is required to be by deed or other instrument *inter vivos* will be

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- (*v*) Sugd. on Pow. 549.
  - (*w*) *Fothergill v. Fothergill*, 2 Freem. 257.
  - (*x*) *Barker v. Hill*, 2 Ch. R. 218; *Reid v. Shergold*, 10 Ves. 370.
  - (*y*) *Pollard v. Greenoil*, 1 Ch. Ca. 10; *Wilkes v. Holmes*, 9 Mod. 485.
  - (*z*) Cowp. 267; *Clifford v. Burlington*, 2 Vern. 379.
  - (*a*) *Sarh v. Blaufrey*, Gilb. Eq. R. 166; *Sneed v. Sneed*, Amb. 64; *Bruce v. Bruce*, L. R. 11 Eq. 371.
  - (*b*) *Barnard*, C. C. 107; *Hervey v. Hervey*, 1 Atk. 561.
  - (*c*) *Innes v. Sayer*, 7 Hare, 377; 3 Mac. & G. 609; *Att.-Gen. v. Sibthorp*, 2 Russ. & My. 107.
  - (*d*) *Ellison v. Ellison*, 6 Ves. 656.
  - (*e*) *Watt v. Watt*, 3 Ves. 244.
  - (*f*) *Tudor v. Anson*, 2 Ves. Sr. 582.
  - (*g*) *Watts v. Bullas*, 1 P. Wms. 60.
  - (*h*) *Smith v. Ashton*, 1 Freem. 309.

aided (i); but not *vice versa*, for if the power is required to be executed only by will, and it is executed by an absolute and irrevocable deed, no relief will be granted (j). Nor will equity aid where the power is executed without the consent of parties who are required to consent to it (k), unless when their consent has become immaterial or impossible to obtain. But equity will supply such defects as the want of a seal, or of witnesses, or of a signature, or defects in the limitations of the property (l).

But we must be careful to distinguish between mere powers and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. Powers are never imperative, they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted (m). But sometimes trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; in other words, the trust may have been vested in him under the garb or in the disguise of a power, but it is none the less for that a trust; and if he refuse to execute it, or die without having executed it, equity will interpose and give suitable relief, because his omission to do so, by accident or design, ought not to disappoint the objects of the donor (n).

(2.) Execution of powers in the nature of trusts, although left wholly un-executed.

In the course of administration of estates, executors and administrators often pay debts and legacies under

Third group of cases.  
(1.) Accident in payment by executors or administrators.

(i) *Tollet v. Tollet*, 1 L. C. 254.

(j) *Reid v. Shergold*, 10 Ves. 370; *Adney v. Field*, Amb. 654.

(k) *Mansell v. Mansell*, cited in *Scott v. Tyler*, 2 Bro. C. C. 450.

(l) *Chance on Powers*, 2878, 2879, 2886, 2890. See 1 Vict., c. 26, s. 10, and 22 & 23 Vict., c. 35, s. 12. (m) *Wilm.* 23.

(n) *Warneford v. Thompson*, 3 Ves. 513; *Brown v. Higgs*, 8 Ves. 574.



a well-founded belief that the assets are sufficient for all purposes. It may turn out, however, from unexpected occurrences, or from unsuspected debts and claims coming to light subsequently, that there is a deficiency of assets for the payment even of the debts. Under such circumstances the executors used to be entitled to no relief at law. But in a court of equity, if they have acted with good faith and with due caution, they will be clearly entitled to relief, upon the ground that otherwise they will be innocently subject to an unjust loss from what the law itself deems an accident (o). An executor or administrator stands in the condition in equity of a gratuitous bailee, and will not be charged without some default in him. Therefore, if any of the goods of the testator are stolen from the executor, or from the possession of a third person to whose custody they have been delivered by the executor, the latter shall not in equity be charged with these assets (p). Again, if the goods be of a perishable nature, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself (q). And since the Judicature Acts, 1873-75, this is now the view accepted in courts of law regarding the executor's position (r).

(2.) A minor bound as apprentice, and master becomes bankrupt.

As another illustration of the doctrine of relief in equity upon the ground of accident, it may be stated, that if a minor is bound as apprentice to a person, and a large premium is given to the master, who becomes bankrupt during the apprenticeship, in such a case equity will interfere, and apportion the premium upon the ground of the failure of the contract from

(o) *Edwards v. Freeman*, 2 P. Wms. 447; *Hawkins v. Day*, Amb. 160; St. 90.

(p) *Jones v. Lewis*, 2 Ves. Sr. 240.

(q) *Clough v. Bond*, 3 My. & Cr. 496; Wms. on Exors. 1666-1679.

(r) *Job v. Job*, 26 W. R. 206; L. R. 6 Ch. Div. 562.

accident (s),—a principle of equity which has been adopted by the Legislature in the Bankruptcy Act, 1869 (t).

II. It remains to consider, secondly, those cases of accident in which equity will not give relief. In the first place, in matters of positive contract and obligation created by the deliberate act of the parties, it is no ground for the interference of equity that the party has been prevented from fulfilling them by accident; or that he has been in no default; or that he has been prevented by accident from deriving the full benefit of the contract on his own side. Thus, if a lessee on a demise covenants to pay rent, or to keep the demised premises in repair, he will be bound to do so in equity as well as at law, notwithstanding the destruction or injury of those premises by inevitable accident, as if they are burnt by lightning, or destroyed by public enemies, or by any other accident, or by overwhelming force (u). The reason is, that he might have provided for such contingencies by his contract, if he had so chosen; and the law will presume an intentional general liability where he has made no exception (v).

And the like doctrine applies to other cases of contract where the parties are equally innocent. Thus, for instance, if there is a contract for a sale at a price to be fixed by an award during the life of the parties, and one of them dies before the award is made, the contract fails, and equity will not enforce it upon the ground of accident; for the time of making the award is expressly fixed in the contract, according to the

(s) *Hale v. Webb*, 2 Bro. C. C. 78.

(t) 32 & 33 Vict., c. 71, s. 33.

(u) *Bullock v. Dommitt*, 6 T. R. 650; *Brecknock Can. Co. v. Pritchard*, 6 T. R. 750; *Belfour v. Weston*, 1 T. R. 310; *Pym v. Blackburn*, 3 Ves. 34, 38.

(v) St. 101. See also *Bute (Marquis) v. Thompson*, 13 M. & W. 487; *Mellers v. Devonshire (Duke)*, 16 Beav. 252.

pleasure of the parties; and there is no equity to substitute a different period (*w*).

(3.) Where party claiming relief has been guilty of gross negligence.

In the next place, courts of equity will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault; for, in such a case, there is in fact no accident properly so called, as above defined, and a party has no claim to come into a court of justice to ask to be saved from the consequences of his own culpable misconduct (*x*).

(4.) Where party claiming relief has no vested right, but only a probability of a right.

Again, courts of equity will not interpose upon the ground of accident where a party has not a clear vested right, but his claim rests in mere expectancy, and in a matter not of trust, but of volition. As if a testator, intending to make a will in favour of particular persons, is prevented from doing so by accident, equity cannot grant relief; for a legatee or devisee is a mere volunteer taking by the bounty of the testator, and has no independent right, until there is a title consummated by law (*y*).

(5.) Equity will not aid one party where the other party has an equal equity.

In the next place, no relief will be granted in equity where the other party stands upon an equal equity, and is entitled to equal protection, as in the case of a *bond fide* purchaser for valuable consideration without notice (*z*).

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(*w*) St. 103; *Blundell v. Brettargh*, 17 Ves. 232-240; *White v. Nutts*, 1 P. Wms. 61; *Mortimer v. Capper*, 1 Bro. C. C. 156.

(*x*) *Ex parte Greenaway*, 6 Ves. 812.

(*y*) *Whitton v. Russel*, 1 Atk. 448.

(*z*) *Powell v. Powell*, Prec. Ch. 278; *Malden v. Menill*, 2 Atk. 8.

## CHAPTER II.

## MISTAKE.

MISTAKE, as recognised and relievable against in a Mistake. court of equity, may be defined, in contradistinction from accident, as some (unintentional act or omission arising from ignorance or surprise, and sometimes from imposition or misplaced confidence } but in the latter case it is not distinguishable from fraud.

This subject may be divided into two classes of cases :—

- I. Mistakes in matter of *law*.
- II. Mistakes in matter of *fact*.

I. As to mistakes in matter of law, it is a general maxim that ignorance of law is no excuse,—*Ignorantia legis neminem excusat*,—and this maxim is about as much observed in equity as at law ; for the presumption is, that every one assuming to deal with his own property is (by himself or his legal advisers) acquainted with his rights to it or in it, provided he has had a reasonable opportunity of knowing them ; and nothing would be more liable to abuse than to permit a person after parting with his property to pretend that, at the time of parting with it, he was ignorant of the law affecting his title. But the maxim applies, properly speaking, only to the general law of the country, and not therefore to ignorance of a private *jus* or right ; and generally it may be said, that in a court of equity

I. Mistake of law,—as a general rule, not relievable. *Ignorantia legis neminem excusat.*

the line between mistakes of law and mistakes of fact has not been very clearly or simply drawn (a).

An agreement under a mistake of law binding.

An agreement entered into in good faith, though under a mistake of law, will in the general case be held valid and obligatory upon the parties. Thus, where a devise was made to a woman upon condition that she should marry with the consent of her parents, and she married without such consent, whereby a forfeiture accrued to other persons, and these latter persons afterwards executed an agreement respecting the estate, whereby the forfeiture was in effect waived, the court refused any relief, Lord Hardwicke saying, "It is said they might know the fact (*i.e.*, of the marriage without consent) and yet not know the consequence in law; but if parties are entering into an agreement, *and the very will out of which the forfeiture arose is lying before them and their counsel* while the drafts are preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point, and shall not be relieved on pretence of being surprised, with such strong circumstances attending it" (b).

Cases in which equity relieves against a mistake of law.

But although relief will not be granted in equity against a mistake in point of law committed with full knowledge of all the facts, there are certain cases apparently exceptions to this general rule, and usually so classed, but which, upon examination, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients going to establish misrepresentation or some imposition or abuse of

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(a) *Cooper v. Phipps*, L. R. 2 H. L. 149, 170; *Turner v. Turner*, *Hall v. Turner*, 14 Ch. Div. 829; and especially *Daniel v. Sinclair*, 6 App. Ca. 180.

(b) *Pullen v. Ready*, 2 Atk. 591; *Irnham v. Child*, 1 Bro. C. C. 92; *Worrall v. Jacob*, 3 Mer. 255.

confidence or undue influence, or that sort of surprise which equity uniformly regards as a just foundation for relief (c). Thus, if a party, acting in ignorance of a clear and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake, *e.g.*, if an eldest son and heir-at-law, knowing that he was the eldest son but too ignorant to know that he was therefore heir-at-law, should agree to divide the estates with his younger brother, such an agreement would be held in a court of equity invalid, and relief would be granted, *scil.* upon the ground that the ignorance of a plain and established doctrine, so generally known and of such constant occurrence, as a common canon of descent, may well give rise to a *presumption that there has been some undue influence, imposition, mental imbecility, or confidence abused* (d). And so also cases of *surprise*, combined with a mistake of law, also stand upon a ground peculiar to themselves. In such cases the agreements or acts are unadvised and improvident, and without due deliberation (e). Where the surprise is mutual, there is of course a still stronger ground to interfere, for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts; or have pre-supposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist (f).

(1.) Where a party acts under ignorance of a plain and well-known principle of law.

(2.) Surprise combined with a mistake of law remedied.

But where the alleged mistake arises not from Compromises, ignorance of a plain and settled principle of law, but —upheld where a doubtful point of law, a compromise fairly entered

(c) *Willan v. Willan*, 16 Ves. 82.

(d) *Broughton v. Hutt*, 3 De G. & Jo. 501; and see remarks of Lord Westbury in *Cooper v. Phipps*, L. R. 2 H. L. 170.

(e) *Evans v. Llewellyn*, 2 Bro. C. C. 150; *Ormond v. Hutchinson*, 13 Ves. 51.

(f) *Willan v. Willan*, 16 Ves. 72, 81; *Cochrane v. Willis*, L. R. 1 Ch. 58.

Family compromises,—  
upheld if no  
*suppressio*  
*veri* or  
*suggestio falsi*,  
but a full disclosure.

into, with due deliberation and full knowledge, will be upheld in a court of equity as reasonable in itself, to terminate the differences by dividing the stake, and as supported by principles of public policy (*g*). And it is in fact upon this ground that the whole doctrine of the validity of family compromises rests; for when family agreements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true or suggestion of what is false, each of the parties investigating the subject for himself, and each communicating to the other all he knows, and all the information which he has received on the question, then, although the parties may have greatly misunderstood their position, and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement (*h*). "Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and especially where those doubts have related to a question of legitimacy, and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this court, albeit, perhaps, resting upon grounds which would not have been considered as satisfactory if the transaction had occurred between strangers" (*i*). And these principles will apply whether the doubtful points, with reference to which the compromise has been made, are matters of fact or of law (*j*). But in order that a family arrangement may be supported, there must be a full and fair communication of all material circumstances affecting the subject-matter of the agreement, which are within the knowledge of the several parties, whether

(*g*) *Pickering v. Pickering*, 2 Beav. 56; *Gibbins v. Caunt*, 4 Ves. 849; *Naylor v. Winch*, 1 S. & S. 564.

(*h*) *Gordon v. Gordon*, 3 Swanst. 463; and see *In re Birchall, Wilson v. Birchall*, 16 Ch. Div. 41.

(*i*) *Westby v. Westby*, 2 Dr. & War. 503.

(*j*) *Neale v. Neale*, 1 Kee. 672; *Westby v. Westby*, 2 Dr. & War. 503.

such information be asked for by the other party or not (*k*). "*There must not only be good faith and honest intention, but full disclosure; and without full disclosure, honest intention is not sufficient*" (*l*).

And the disinclination of equity to set aside a family or other compromise entered into *bond fide*, and with a full disclosure of all facts known to either party, will be strengthened where subsequent arrangements have taken place on the footing of such a compromise (*m*). But where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual intoxication, and want of professional advice, courts of equity have manifested a strong disinclination to support a compromise, whether between members of a family or between strangers (*n*). Equity will not aid where position of parties has been altered. Secus,—where gross ignorance or imposition.

It has been already stated that where a *bond fide* purchaser for valuable consideration without notice is concerned, equity will not interfere to grant relief in favour of a party, although he has acted in ignorance of his title upon a mistake of law; for in such a case the purchaser has at least an equal right to protection with the party who has committed the mistake; and where the equities are equal, the court will not interfere between the parties (*o*). Equity will not aid against a *bond fide* purchaser for value without notice.

II. As to mistakes of fact, the general rule is that an act done or contract made under a mistake or in ignorance of a material fact is voidable and relievable in equity; for it is not possible that any one can, by II. Mistake of fact,—as a general rule, relievable.

(*k*) *Greenwood v. Greenwood*, 2 De G. Jo. & Sm. 28.

(*l*) *Gordon v. Gordon*, 3 Swanst. 400; *De Cordova v. De Cordova*, 4 App. Ca. 692; and see *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Sturge v. Sturge*, 12 Beav. 229.

(*m*) *Clifton v. Cockburn*, 3 My. & K. 76; *Benley v. Mackay*, 31 Beav. 143, 10 W. R. 873.

(*n*) *Dunnage v. White*, 1 Swanst. 137; *Perse v. Perse*, 7 C. & Fin. 318.

(*o*) *Malden v. Menill*, 2 Atk. 8.



any amount of diligence, acquire a knowledge of all matters of fact. With reference to this subject, the following general propositions may be laid down :—

(a.) Principles on which relievable.

1. Fact must be material.

1. The rule as to ignorance or mistake of a fact entitling the party to relief is to be taken with this important qualification,—that the fact must be material to the act or contract; that is, that it must be essential to its character. For though there may be an accidental ignorance or mistake of a fact, yet, if the act or contract is not materially affected by it, the party claiming relief on that immaterial ground will be denied it. And the same principle is applicable though the mistake be mutual, as if a person should sell a message to another which was at the time swept away by a flood, without either party having any knowledge of the fact, equity would relieve the purchaser upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract (*p*).

2. Fact must be such as party could not get knowledge of by diligent inquiry.

2. It is not, however, sufficient in all cases, to give the party relief, that the fact is material; but the fact must also be such as he could not by reasonable diligence get knowledge of, when he was put upon inquiry. For if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.

3. Party having knowledge must have been under an obligation to discover the fact.

3. In cases where one of the contracting parties has knowledge of a fact material to the contract which he does not communicate to the other, it is necessary, in order that the latter may set aside the transaction on the ground of such concealment, that the former

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(*p*) *Hore v. Becker*, 12 Sim. 465; *Cochrane v. Willis*, L. R. 1 Ch. 58.

should have been under an obligation, not merely moral, but legal or equitable, to make the discovery.

4. Where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment with regard to a subject-matter, where there is no confidence reposed, but each party is dealing with the other at arm's length, equity will not relieve. And therefore where the fact (not being a fact amounting to the entire subject-matter of the contract) is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a court of equity will not interpose (q).

4. Where means of information are equally open to both, and no confidence reposed, no relief.

The general ground upon which all these distinctions proceed is, that mistake or ignorance of facts in parties is a proper subject of relief only where it

General summary of the principles of relief.

1. constitutes a material ingredient in the contract of
2. the parties, or disappoints their intention by a mutual
3. error; or where it is inconsistent with good faith,
4. and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference (r).

- 1,
- 2,
- 3.

It is a general rule of law that oral evidence shall in no case be received as equivalent to, or as a substitute for, written evidence.

Oral evidence admissible to prove accident, mistake, or fraud.

(q) *Mortimer v. Capper*, 1 Bro. C. C. 158, 6 Ves. 24; *Ainslie v. Medlycott*, 9 Ves. 13.

(r) *Jones v. Clifford*, L. R. 3 Ch. Div. 779; and see *Hanley v. Pearson*, 13 Ch. Div. 545, citing *Smith v. Iffe*, L. R. 20 Eq. 666.

stitute for, a written instrument, where the latter is required by law, or to give effect to a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter, or vary a written agreement, either appointed by law or by the compact of private parties, to be the appropriate and authentic memorial of the particular facts which it recites (s). But, upon principle, oral evidence is admissible to show that either by accident, mistake, or fraud, a written agreement has not been constituted the depository of the intention and meaning of the parties. To enforce the performance of an agreement under such circumstances would be the highest injustice; it would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake or accident to resist the claims of justice, under shelter of a rule framed to promote it (t).

The general rule as to the admissibility of evidence in cases of mistake may be thus stated:—Where, by mistake, an instrument *inter vivos* is not what the parties intended, or there is a mistake in it, other than a mistake in law, and the mistake is clearly made out by admissible and satisfactory evidence, or is admitted by the other side (u), or is evident from the nature of the case, or from the rest of the deed, equity will rectify the mistake (v).

Mistake implied from nature of the case.

Courts of equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction.

(s) 3 Starkie on Ev. 753.

(t) *Murray v. Parker*, 19 Beav. 308.

(u) *Davis v. Symonds*, 1 Cox. 404; *Russel v. Davy*, 6 Gr. 165.

(v) Sm. Man. 49; *Murray v. Parker*, 19 Beav. 305; *Fowler v. Fowler*, 4 De G. & Jo. 250; *Townshend v. Stangroom*, 6 Ves. 333.

Thus, a partnership debt has been treated in equity as the several debt of each partner, though, at law, it is the joint debt of all; because in such cases all have had a benefit from the money advanced, or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. So where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay (*w*).

But where the inference of a several original debt or liability does not exist, a court of equity will not interfere unless there is evidence of mistake. The Master of the Rolls, in *Sumner v. Powell* (*x*), thus expresses himself:—"It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. . . . *When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived.* . . . But in this case the covenant is purely a matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken. . . . It is not attempted to be shown that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. *There is nothing but the covenant itself by which its intended extent can be ascertained.* There is no ground, therefore, on which a court of equity can give it any other than its legal operation and effect" (*y*).

Exception to last stated principle.

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(*w*) *Sumner v. Powell*, 2 Mer. 36; *Devaynes v. Noble*, 1 Mer. 538; and see *Kendall v. Hamilton*, 3 C. P. Div. 403, and on appeal 4 App. Ca. 504 (the true nature of a partnership debt). See also *Welman v. Welman*, 15 Ch. Div. 570; and *Lovesy v. Smith*, 15 Ch. Div. 655.

(*x*) 2 Mer. 36.

(*y*) *Richardson v. Horton*, 6 Beav. 187; *Underhill v. Horwood*, 10 Ves. 227, 228; *Rawstone v. Parr*, 3 Russ. 424, 539.

(b.) Cases in which equity relieves against mistake of fact.  
(1.) RECTIFICATION OF MISTAKES IN MARRIAGE SETTLEMENTS.

(aa.) Both marriage articles and settlement before marriage.

There is less difficulty in reforming written instruments where the mistake is mainly or wholly made out by other preliminary written instruments or memoranda of the agreement. This is strongly illustrated in cases of marriage settlements. With reference to these, the following cases may occur:—

(aa.) Both the marriage articles as well as the definitive settlement may exist before the marriage. In this case, if the articles and the settlement vary in their terms, the settlement will in general be considered the binding instrument, and will not be controlled by the articles, because, as observed in *Legg v. Goldwire* (z), “When all parties are at liberty, the settlement will be taken as a new agreement.”

(bb.) Where pre-nuptial settlement purports to be in pursuance of the articles.

(bb.) But where the settlement, though made before marriage, purports to be *in pursuance of the articles* entered into before marriage, and there is a variance, the settlement will be rectified in accordance with the articles (a).

(cc.) Extrinsic evidence admissible to show that pre-nuptial settlement was made in pursuance of articles.

(cc.) And even although a settlement made before marriage contains no reference to the articles, yet if it can be shown that the settlement was intended to be in pursuance of the articles, and there is clear and satisfactory evidence that the discrepancy has arisen from a mistake, the court will reform the settlement and make it conformable to the articles as expressing the real intention of the parties (b).

(dd.) Settlement after marriage.

(dd.) Where the settlement is made after marriage, it will in all cases, whether purporting to be made in

(z) 1 L. C. 17; and see *In re Badcock, Kingdon v. Tagert*, 17 Ch. Div. 361.

(a) *West v. Eisey*, 1 Bro. P. C. 225; *Bold v. Hutchinson*, 5 De G. M. & G. 568.

(b) *Bold v. Hutchinson*, 5 De G. M. & G. 558, 568; *Breadalbane v. Chandos*, 2 My. & Cr. 739.

pursuance of the pre-nuptial articles or not, be controlled and rectified by them (c).

In *Barrow v. Barrow* (d), it was held that the erroneous belief by the husband and wife on their marriage that a particular property stood settled, was no ground for rectifying a settlement so as to make it include that property:—"Where a settlement has been executed which carried into effect a contract framed under a mistaken apprehension of the facts, and a marriage has been actually solemnised on the faith of that contract and that settlement, it would be to substitute a new contract between the parties, and not to carry the real contract into effect, if I were to alter the settlement" (e).

The court will not correct an instrument made in consideration of marriage, except on evidence of the mistake of both parties. In a case (f) where the husband alone laboured under a mistake, Kindersley, V.C., said:—"The wife is bargaining for herself and her children, and the question always is, What is the contract on which the marriage took place? Here, so far as the wife's contract and understanding are concerned, the contract is the settlement as it stands, though the husband did not understand that it would affect his property" (g). Save and except in the case of marriage contracts, the mistake need not be that of both parties; the mistake of one will suffice.

Where an instrument has been delivered up or cancelled under a mistake of the party, and in ignorance of the facts material to the rights derived under it, a

Mistake in marriage contracts must be of both parties.

(2.) Instrument delivered up or cancelled under a mistake.

(c) *Legg v. Goldwire*, 1 L. C. 17; *Honor v. Honor*, 1 P. Wms. 123; *Mignan v. Parry*, 31 Beav. 211.

(d) 18 Beav. 529.

(e) *Wilkinson v. Nelson*, 9 W. R. 393.

(f) *Sells v. Sells*, 1 Dr. & Sm. 45.

(g) *Thompson v. Whitmore*, 1 J. & H. 268; *Bradford v. Romney*, 30 Beav. 431.

court of equity will in all cases grant relief, upon the ground that the party is conscientiously entitled to enforce such rights; and that he ought to have the same benefit as if the instrument were in his possession with its entire original validity (*h*).

(3.) Defective execution of powers.

As to the remedy offered by equity in cases of defective execution of powers arising from mistake, the same general principles are applicable as in cases of defective execution arising from accident (*i*).

(4.) Mistakes in wills.

In regard to mistakes in wills, there is no doubt that courts of equity have or had jurisdiction to correct them when they are apparent upon the face of the will, or may be made out by a due construction of its terms, for in cases of wills the intention will prevail over the words. But then the mistake must be apparent on the face of the will, otherwise there can be no relief; for parol evidence or evidence dehors the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity (*j*).

(aa.) Mere misdescription of legatee will not defeat legacy, unless legacy obtained by a false personation.

(aa.) It is clear that in point of law a mere misdescription of a legatee will not defeat the legacy. But it is equally clear that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which can alone be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy (*k*). Thus, where a woman gave a legacy to a man, describing him as her husband, when, in point of fact, the marriage was void, he having a former wife then living, the bequest was in equity

(h) *East India Co. v. Donald*, 9 Ves. 275.

(i) See pp. 423-425, *supra*.

(j) *Milner v. Milner*, 1 Ves. Sr. 106; *Stebbing v. Walkey*, 2 Bro. C. C. 85.

(k) *Giles v. Giles*, 1 Keen, 692.

held void (l). But when a testator made a will giving all his property to his wife, and appointing her sole executrix, and she (it was alleged) was not his lawful wife, having had a former husband living, the Court of Chancery in a very recent case declined jurisdiction, upon the ground that the matter was one for the Court of Probate (m),—a decision which goes far towards cutting away altogether the jurisdiction of the Chancery Division in the matter of mistakes in wills, and obliging the litigants to take the objection in the Probate Division, and no longer, as heretofore, in the Chancery Division (n).

(bb.) Where a legacy is given or revoked upon a mistake of facts, equity will give relief. Thus, if a testator revokes legacies to A. and B., giving as a reason that they are dead, and they are in fact living, equity will, or at one time would, hold the revocation invalid, and decree the legacies (o). But a false reason given for a legacy, or for the revocation of a legacy, was not always a sufficient ground to avoid the act or bequest in equity. To have such an effect, it must have been clear that no other motive mingled in the legacy, and that it constituted the substantial ground of the act or bequest (p). In *Kennell v. Abbot* (q), the Master of the Rolls thus expressed himself:—"I desire to be understood not to determine that where, from circumstances not moving from himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection for that child, supposing it to be his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and

(l) *Kennell v. Abbot*, 4 Ves. 808.

(m) *Meluish v. Milton*, L. R. 3 Ch. Div. 27, following *Allen v. M'Pherson*, 1 H. L. C. 191; and see *Alderson v. Maddison*, 7 Q. B. D. 174.

(n) *Betts v. Doughty*, 5 P. D. 26; *Morrell v. Morrell*, 7 P. D. 68.

(o) *Campbell v. French*, 3 Ves. 321.

(p) *Box v. Barrett*, L. R. 3 Eq. 244.

(q) 4 Ves. 808.



the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it, and might entitle him, though he might not fill that character in which the legacy is given. Neither would I have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field."

Cases in which equity will not relieve against a mistake of fact.

(1.) The party claiming relief must have a superior equity.

Finally, it must be remembered, that in all cases of relief by aiding or correcting defects or mistakes, the party seeking relief must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a court of equity is silent and passive. Thus, equity will not give relief as against a *bond fide* purchaser for valuable consideration (r).

(2.) No relief as between volunteers.

Nor will equity relieve one person claiming under a voluntary defective conveyance against another claiming also under a voluntary conveyance, but will leave the parties to their rights at law (s).

(3.) Or where defect is declared fatal by statute.

Nor will the remedial powers of courts of equity extend to the supplying of any circumstances for the want of which the Legislature has declared an instrument void; for otherwise equity would in effect defeat the very policy of the legislative enactments (t).

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(r) *Powell v. Price*, 2 P. Wms. 535; *Davies v. Davies*, 4 Beav. 54; *Thompson v. Simpson*, 1 Dr. & War. 491.

(s) *Moodie v. Reid*, 1 Mad. 516.

(t) *Hibbert v. Rolleston*, 3 Bro. C. C. 571; *Dixon v. Ewart*, 3 Mer. 322.

## CHAPTER III.

## ACTUAL FRAUD.

It may be laid down as a general rule that courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of, the common law courts. There are a variety of cases of fraud for which the common law affords complete and adequate relief, and with reference to these cases, Chancery may be said to possess a general and perhaps a universal *concurrent* jurisdiction. That court would not, however, have readily interfered to stay proceedings at law where the plaintiff's case in equity might have been pleaded as a defence to the action, and complete justice might thereby be done at law (a); and of course, since the Judicature Acts, equity cannot now stay any proceedings at law, but the parties may move (in a proper case) to have the action transferred to the Chancery Division. Moreover, there were many cases in which fraud was utterly irremediable at law, and over these courts of equity had an exclusive jurisdiction, and they still in substance retain it.

In what cases  
relief given in  
equity.

"As to relief against frauds, no invariable rules can be established. Fraud is infinite; and were a court of equity once to lay down rules how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded

No invariable  
rule.

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(a) *Hoare v. Bremridge*, L. R. 8 Ch. 22.

by new schemes, which the fertility of man's invention would contrive" (b).

To attempt, therefore, the definition of a subject so varied and diversified in its forms as fraud, would scarcely be judicious or useful, if it were possible. The mode and extent of the equity jurisdiction over fraud will best be illustrated by the examination of a few of the more marked classes of cases, in which the principles which regulate the action of courts of equity are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.

Equity acts  
upon weaker  
evidence  
than law in  
inferring  
fraud.

Before, however, proceeding to those subjects, it may be proper to observe that although courts of law, equally with courts of equity, hold that fraud is not to be presumed, the latter courts used to act upon circumstances as presumptions of fraud where courts of common law would not have deemed them satisfactory proofs. In other words, courts of equity would grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law (c). Or, to express the matter rather more fairly, various circumstances (which at law would not have weighed materially with a jury) were permitted by the Vice-Chancellor, drawing inferences from his varied experience of like transactions, to influence his mind in arriving at his own conclusions upon the case; for the student should always bear in mind that nothing is or can be evidence in equity which is not evidence also at law.

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(b) Park's Hist. of Chan. 508.

(c) *Chesterfield v. Janssen*, 1 L. C. 551; *Fullager v. Clarke*, 18 Ves. 483.

The subject of fraud may be divided into two sections,—Actual Fraud and Constructive Fraud.

An actual fraud may be defined as something said, *Actual fraud.* done, or omitted, with the design of perpetrating what the party must have known to be a positive fraud (*d*).

Actual frauds are of two kinds (*e*)—

*Of two kinds.*

I. Frauds arising irrespectively of any peculiarity in the position of the injured party; and,

II. Frauds arising chiefly from a consideration of the peculiar position of the injured party.

I. (*a*.) One of the largest classes of cases in which courts of equity are accustomed to grant relief is where there has been a misrepresentation, or *suggestio falsi*. With reference to this subject the following propositions may be laid down:—

*I. Arising irrespectively of position of injured party. (a.) Misrepresentation.*

Where a party intentionally, or by design, misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage over him, in every such case there is a positive fraud, in the truest sense of the term (*f*). And what is more, every man must be held responsible for the consequences of a false representation made by him to another, upon which a *third person* acts, and so acting is injured or damnified; *provided it appear that such false representation was made with the intent that it should be acted upon by such third person* in the manner that occasions the injury or loss, and provided the injury be the immediate and not the remote consequence of the representation thus made (*g*).

*Where the party makes it intentionally.*

*Misrepresentation made with intent to mislead a third party.*

(*d*) Sm. Man. 56.

(*e*) Sm. Man. 58.

(*f*) *Hill v. Lane*, L. R. 11 Eq. 215.

(*g*) *Barry v. Croskey*, 2 Johns. & Hem. 22; *Attorney-General v. Ray*, L. R. 9 Ch. 397.

Where party did not know his assertion to be true.

And not only does fraud exist where the statements are known to be false by those who make them, but a case of fraud is also constituted where statements, false in fact, are made by persons who do not know them to be true or false, or who believe them to be true, if, in the due discharge of their duty, they ought to have known, or if they had formerly known and ought to have remembered the fact, which negatives the representation made (h).

What misrepresentations entitled to relief.

(1.) Misrepresentation must be of some material fact i.e., it must be a case of *fraus dans locum contractui*.

As a matter of conscience, any deviation from the most exact and scrupulous sincerity is contrary to the good faith that ought to prevail in contracts. But courts of justice generally find themselves compelled to assign limits to the exercise of their jurisdiction, far short of the principles deducible *ex æquo et bono*; and with reference to the concerns of human life, they endeavour to aim at mere practical good and general convenience. Accordingly, therefore, a misrepresentation, in order to justify the rescission of a contract, must be *as to some material fact constituting an inducement or motive to the act or omission of the other party*. "To use the expression of the Roman law, it must be a *fraus dans locum contractui*, that is, a misrepresentation giving occasion to the contract; the proper interpretation of which appears to me to be the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into the contract, or the suppression of a fact the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether (i).

In the next place, the misrepresentation must (at

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(h) *Pulsford v. Richards*, 17 Beav. 94; *Rawlins v. Wickham*, 1 Giff. 355; 3 De G. & Jo. 304.

(i) *Pulsford v. Richards*, 17 Beav. 96.

2 least, in cases of vendor and purchaser) be not only in something material, but it must be something in regard to which the one party places a known trust or confidence in the other. (2.) Misrepresentation must be of something in which there is a confidence reposed.

For if the purchaser, choosing to judge for himself, does not avail himself of the knowledge, or means of knowledge, open to him or his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations, for the rule in such a case is *caveat emptor*. To this ground of unreasonable indiscretion and confidence may be referred the language of puffing and commendation of commodities, which, however reprehensible in morals, as gross exaggerations or departures from truth, are nevertheless not treated as frauds which will avoid contracts. *Simplex commendatio non obligat*. Further, the alleged misrepresentation must not be a mere matter of opinion, equally open to both parties for examination and inquiry, where neither party is presumed to trust the other, but to rely on his own judgment. Mere puffing, with opportunity to examine, is no misrepresentation.

3 In the next place, the party must be misled by the misrepresentation; for if he knows it to be false when made, it cannot influence his conduct, and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make under such circumstances (j); and if the representation is merely ambiguous, the party complaining of fraud in it must show the sense in which he understood it (k), and that may not always be of much service to him. And further, the party must have been misled to his prejudice or injury; for courts of equity do not, 4 any more than courts of law, sit for the purpose of enforcing moral obligations, or correcting uncon-

(3.) The party must be misled by the representation to his prejudice.

(j) *Nelson v. Stocker*, 4 De G. & Jo. 458; *Redgrave v. Hurd*, 20 Ch. Div. 1.

(k) *Smith v. Chadwick*, 20 Ch. Div. 27.

scientious acts, which are followed by no loss or damage (*l*).

Fraud, consisting in misrepresentations by directors of companies.

In the case of misrepresentations made by the directors of joint-stock and other companies, the company is responsible for the damage to the extent of the profits it has made thereby, and otherwise the remedy is against the directors personally (*m*). Further, the defrauded person may in such a case recover, or (as the case may be) prove for, the amount paid by him to the company (*n*). As regards the fraudulent directors, they are jointly and severally liable, and the action may therefore be brought against one or more of them alone without the other or others (*o*). But, *nota bene*, no action lies against the executor of a deceased fraudulent director, unless to the extent (if any) that his estate has profited thereby (*p*).

Remedy, where misrepresentation can be made good, and where it cannot.

Where a person has been induced to enter into a contract by a material misrepresentation of the other party, the latter shall be compelled to make it good at the option of the former, if the representation be one which can be made good; if not, the person deceived shall be at liberty to avoid the contract (*q*).

Defences against action: (1.) The plaintiff was *particeps fraudis*.

A person cannot avail himself of what has been obtained by the fraud of another, unless he is not only free from any participation in the fraud, but also has given some valuable consideration (*r*). Otherwise, he who takes the property, as was said in *Bridgeman v. Green* (*s*), "must take it tainted and infected with the

(*l*) *Slim v. Croucher*, 1 De G. F. & J. 518; *Fellowes v. Gwydyr*, 1 Sim. 63.

(*m*) *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145.

(*n*) *Alkison's Case*, L. R. 15 Eq. 394.

(*o*) *Parker v. Lewis*, L. R. 8 Ch. App. 1035.

(*p*) *Peck v. Gurney*, L. R. 6 H. L. 377.

(*q*) *Pulsford v. Richards*, 17 Beav. 95; *Rawlins v. Wickham*, 3 De G. & Jo. 304, 322; *Attorney-General v. Ray*, L. R. 9 Ch. 397.

(*r*) *Scholefield v. Templer*, 4 De G. & Jo. 433; *Vane v. Vane*, L. R. 8 Ch. 383.

(*s*) *Wilm.* 64.

imposition of the person procuring the gift: his partitioning and cantoning it out amongst his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

The defrauded party may, by his subsequent acts, with full knowledge of the fraud, deprive himself of all right to relief, as well in equity as at law; as if with full knowledge of the fraud he gives a release to the party who has defrauded him, or has continued to deal with him after he knew all the facts (t).

(2.) The plaintiff's subsequent ratification.

(b.) Another class of cases for relief in equity is where there is an undue concealment or *suppressio veri*, to the injury or prejudice of another. A *suppressio veri* is as fatal as a *suggestio falsi*. It is not every concealment, however, even of facts that are material to the interests of a party, which will entitle him to the interposition of a court of equity, and in this respect concealment differs from misrepresentation. The case must amount to the suppression of facts which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, in respect of which he cannot be innocently silent, and which the other party has a right, not merely *in foro conscientiae*, but *in foro juridico*, to know (u).

(b.) *Suppressio veri*,—a ground of relief, only where the party was under a legal obligation to disclose.

Thus, it was said by Lord Thurlow in *Fox v. Mackreth* (v), that if A., knowing of a mine on the estate of B., of which he knows B. to be ignorant, should, concealing the fact, enter into a contract to purchase

Purchase of land with mine unknown to vendor, but known to vendee.

(t) St. 203 (a); *Vigers v. Pike*, 8 Cl. & Fin. 562, 630; *Mitchell v. Homfray*, 8 Q. B. D. 587.

(u) *Fox v. Mackreth*, 1 L. C. 123; *Turner v. Harvey*, Jacob, 178.

(v) 2 Bro. C. C. 420.



that estate for a price which it would be worth without considering the mine, the contract would be good. In such cases, the question is not whether an advantage has been taken which in point of morals is wrong or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but also to show some obligation binding the party to make the discovery.

Sale of land subject to incumbrances known only to vendor.

X

On the other hand, if a vendor should sell an estate knowing he had no title to it, or knowing that there were incumbrances on it of which the vendee was ignorant, the suppression of such a material fact, in respect of which the vendor must know that the very purchase implied a trust and confidence on the part of the vendee that no such defect existed, would clearly avoid the sale on the ground of fraud (*w*).

As to intrinsic defect in personal chattels, *caveat emptor*; unless there be some artifice or warranty, or vendor was bound to disclose.

In many cases, especially in the case of sales of personal chattels, the maxim *caveat emptor* is applied; and unless there be some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, and unless the vendor is under some obligation to make a disclosure, the vendee is understood to be bound by the sale, notwithstanding there may be any intrinsic defects in it known to the vendor, but unknown to the vendee, materially affecting its value, and regarding which the vendor has merely held his tongue. *Nam qui tacet, non videtur affirmare* (*x*).

Silence tantamount to direct affirm-

But there are, on the other hand, certain cases where, from the very nature of the transaction, the silence of

(*w*) *Arnot v. Biscoe*, 1 Ves. Sr. 95, 97; *Edwards v. M'Leay*, 2 Swanst 287; *Ellard v. Llandaff*, 1 Ball. & B. 241.

(*x*) *Martin v. Morgan*, 1 Brod. & Bing. 289; *Walker v. Symonds*, 3 Swanst. 62.

the party—his mere concealment of a fact—must im-  
 port as much as a direct affirmation, and be deemed  
 equivalent to it. Cases of insurance afford a ready  
 illustration of this doctrine. In such cases the under-  
 writer necessarily reposes a trust and confidence in the  
 insured as to all facts and circumstances which are  
 peculiarly within his (the insured's) own knowledge,  
 and which are not of a public and general nature, or  
 which the underwriter either knows or is bound to  
 know. Indeed, most of the facts and circumstances  
 which may affect the risk are generally within the  
 knowledge of the insured only; and therefore, the  
 underwriter may be said emphatically to place trust  
 and confidence in him as to all such matters. And  
 hence the general principle is, that in all cases of  
 insurance the insured is bound to communicate to the  
 underwriter all facts and circumstances material to the  
 risk within his knowledge; and if they are withheld,  
 whether the concealment be by design or by accident,  
 it is equally fatal to the contract (y).

Inadequacy of consideration, or any other inequality  
 in the bargain, is not to be understood as constituting  
*per se* a ground to avoid a bargain in equity (z). For  
 courts of equity, as well as of law, act upon the ground  
 that every person who is not, from his peculiar circum-  
 stances or condition, under disability, is entitled to  
 dispose of his property in such manner, and upon such  
 terms, as he chooses. Besides, the value of a thing is  
 what it will produce, in its nature fluctuating, and de-  
 pending on a thousand different circumstances. One  
 man, in the disposal of his property, may sell it for  
 less than another would. He may sell it under a  
 pressure of circumstances which may induce him to

tion,—but in  
 exceptional  
 cases only,  
 &c.,—  
 Cases of in-  
 surance.

Inadequacy of  
 consideration  
*per se* will not  
 avoid a con-  
 tract.

(y) *Pole v. Fitzgerald*, 4 Bro. P. C. 439; *De Costa v. Scandret*, 2 P. Wms. 170; *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511. See also *London Assurance Co. v. Mansel*, 11 Ch. Div. 363.

(z) *Abbot v. Swarder*, 4 De G. & Sm. 448; *Harrison v. Guest*, 6 De G. M. & G. 424.

part with it at a particular time. On the other hand, the sole inducement to a purchaser may be the lowness of the price; or the purchaser may have simply accepted the proposals of the vendor, instead of being the originator of the transaction, like a man whose design is to gain a fraudulent advantage over another (a).

Inadequacy may be evidence of fraud, especially an inadequacy shocking the conscience, or an inadequacy coupled with other circumstances of suspicion.

Still, however, there may be such unconscionableness or inadequacy in a bargain as to demonstrate *per se* some gross imposition or undue influence; and in such cases courts of equity will interfere upon the ground of inadequacy alone. But then such unconscionableness or such inadequacy should be made out as would shock the conscience, and would amount in itself to conclusive and decisive evidence of fraud. And where the inadequacy is not of that shocking character, but there are other ingredients in the case of a suspicious nature, the inadequacy furnishes the most vehement presumption of fraud (b); as if proper time is not allowed to the party, and he acts improvidently; if he is importunately pressed; if those in whom he places confidence make use of strong persuasions; if he is not fully aware of the consequences, but is suddenly drawn into the act; if he is not permitted to consult disinterested friends or counsel before he is called upon to act in circumstances of sudden emergency or unexpected right or acquisition: in these, and many like cases, if there has been gross inequality in the bargain, courts of equity will set aside the contract at the instance of the party defrauded.

However, suspicious circumstances are many times explained away consistently with truth and fairness, and even an apparent inadequacy may not be a real

(a) Sm. Man. 64.

(b) *Harrison v. Guest*, 6 De G. M. & G. 424.

inadequacy when everything is known. Thus, in *Harrison v. Guest* (c), where, after the death of a vendor, the sale was impeached by his representatives, on the ground that at the time of the sale he was an illiterate, bed-ridden old man of seventy-one years of age, and had acted without independent professional advice, and had conveyed away the property in question, of the value of £400, for the consideration of a provision by way of board and lodging during his life, which only endured six weeks after the conveyance, it was held that, in the absence of any fraud, and the evidence showing that he had declined to employ professional advice for himself, such a transaction was not impeachable on the mere ground of the apparent inadequacy of consideration (d). Harrison v. Guest,—an apparent inadequacy explainable away.

Moreover, courts of equity will not relieve in all cases, even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed *in statu quo*; as, for instance, in cases of marriage settlements, for the court cannot unmarry the parties (e). Equity will not aid where parties cannot be placed in statu quo.

Contracts affected with fraud are in general voidable only, and not void; consequently, such a contract is valid until it is rescinded. The rescission may become impossible after the rights of third parties have intervened. Thus, a fraudulent contract cannot be rescinded after the commencement of the winding up of the company (f). A *de facto* removal of the shareholder's name from the register, or even the commencement of an action for the removal, is, however, a sufficient repudiation of the fraudulent contract. Fraudulent contracts usually valid, until avoided.

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(c) 6 D. G. M. & G. 424.

(d) *Abbott v. Swarder*, 4 D. G. & S. 448; *Longmate v. Ledger*, 2 Giff. 157.

(e) *North v. Ansell*, 2 P. Wms. 619.

(f) *Spackman v. Evans*, L. R. 3 H. L. 171; *Oakes v. Turquand*, L. R. 2 H. L. 325.

If the fraudulent contract should in any case be void, then no repudiation of it is required.

Occasionally, however, contracts for shares, although fraudulent, are not avoidable at all; thus, if A. by fraud induces B. to buy A.'s shares, and the company is not implicated in A.'s fraud, then of course the contract will hold good as between B. and the company, and B.'s remedy (if any) is against A. only, and is for a re-transfer of the shares and an indemnity (g); and the rule is the same, even if A. be a director of the company.

Frauds which are so by force of statute merely.

There are a few frauds in relation to companies which are frauds by force of statute merely. Thus, under the 164th section of the Companies Act, 1862, any conveyance, mortgage, &c., which in the case of an individual trader would be a fraudulent preference on his bankruptcy under the 92nd section of the Bankruptcy Act, 1869, is a fraudulent preference also on the winding up of a company. And under the 38th section of the Companies Act, 1867, the non-disclosure of contracts between the promoters of a projected company and the persons contracting with them, if the contracts are of a kind to influence the prospective shareholders, renders the prospectus fraudulent (h), the promoters, when at least they are the sole source of information, or are otherwise bound to disclose, being in a sort of fiduciary relation and liable for concealment as well as for misrepresentation (i).

II. Cases of fraud arising from the condition of the injured parties. Free and full consent necessary to every agreement.

II. Cases of fraud arising chiefly from the peculiar condition of the injured parties.

The general theory of the law in regard to acts done and contracts made by parties affecting their rights

(g) Kerr on Fraud, 273.

(h) *New Sombrero Phosphate Co. v. Erlanger*, 6 Ch. Div. 73; 3 App. Ca. 1218.

(i) Kerr on Fraud, p. 65; Buckley on Companies Acts, 3d edition, p. 455; *Arkwright v. Newbold*, 17 Ch. Div. 301.

and interests, is that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. And, therefore, it has been well remarked that every true consent supposes three things: first, a physical power; secondly, a moral power; and thirdly, a serious and free use of them.

Gifts and legacies are often bestowed upon persons upon condition that they shall not marry without the consent of parents, guardians, or other confidential persons. In such cases, the doctrine is now firmly established that courts of equity will not suffer the manifest object of the condition to be defeated by the fraud, or dishonest, corrupt, or unreasonable refusal of the party whose consent is required to the marriage (j).

Gifts and legacies on condition against marrying without consent.

1. Hence it is that the contracts and other acts of persons *non compotes mentis* (not so found by inquiry and *a fortiori* if so found), wherever, from the nature of the transaction, there is not entire good faith, or the contract or other act is not seen to be just in itself, or for the benefit of those persons, will be set aside in a court of equity. But where a contract is entered into with good faith, and is for the benefit of such persons, such as for necessities, courts of equity, as well as of law, will uphold the transaction; also, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo*, or in the state in which they were before the purchase (k).

1. Persons *non compotes mentis*,—their contracts are usually void.

But a contract with a lunatic in good faith, and for his benefit, will be upheld.

(j) *Dashwood v. Bulkeley*, 10 Ves. 245; *Clarke v. Parker*, 19 Ves. 18.

(k) *Manby v. Bewicke*, 3 K. & J. 342.

2. Drunkenness,—amounting to a want of understanding, contracts how affected by.

2. But to set aside any act or contract on account of drunkenness it is not sufficient that the party is under undue excitement or lethargy from liquor. The excitement or lethargy must rise to that degree in which the party is utterly deprived for the time of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part. If there be not that degree of excitement or of lethargy, then courts of equity will not interfere at all, at least upon the mere ground of drunkenness; but, of course, there may have been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication, and in that case the court might relieve. In general, courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained a deed or agreement from another in a state of intoxication; and on the other hand, they are equally unwilling to assist the intoxicated party (unless he was wholly incapacitated as aforesaid) to get rid of his agreement or deed merely on the ground of his intoxication at the time; but they leave the parties to their ordinary remedies at law, unless there is some contrivance or some imposition practised (1).

Parties left to their remedy at law.

3. Imbecile persons.

3. Closely allied to the foregoing are cases where a person, although not positively *non compos* or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence. In such cases, if the circumstances justify the conclusion that the party has been imposed on or circumvented, the transaction will be held void in equity; and the burden of proof is on the other party, to show that no unfair advantage was

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(1) *Clarkson v. Kilson*, 4 Gr. 244.

taken of his weakness, and that a fair price was given to him (*m*).

4. Cases of an analogous nature may be easily put, where the party is subjected for the time to undue influence, although in other respects and at other times he is of competent understanding; as where he does an act or makes a contract when he is under duress, or under the influence of extreme terror, or of threats, or of apprehensions short of duress. For in cases of this sort he has no free will, but stands *in vinculis*. And the constant rule in equity is, that where a party is not a free agent, and is not equal to protecting himself, the court will protect him (*n*). Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may in like manner justify the court in setting aside a contract by him, on account of some oppression, or fraudulent advantage, or imposition attendant upon it (*o*).

4. Persons of competent understanding under undue influence.

(a.) Duress.

(b.) Extreme necessity.

5. The acts and contracts of infants (not being for necessities) are not, as a general rule, binding upon them, because the presumption of the law is that they have not sufficient reason or discernment of understanding to bind themselves. There are indeed certain cases in which infants are permitted by law to bind themselves by their acts and contracts; for, not to mention contracts for necessities suitable to their degree and quality, which are, of course, binding upon them, they are also bound by a contract of hiring and services for wages, or by some act which the law requires them to do. But generally infants are favoured by the law, as

5. Infants.

(*m*) *Longmate v. Ledger*, 2 Giff. 164.

(*n*) *Evans v. Llewellyn*, 1 Cox, 340; *Hawes v. Wyatt*, 3 Bro. C. C. 158; *M'Cann v. Dempsey*, 6 Gr. 192.

(*o*) St. 239; *Gould v. Okeden*, 4 Bro. P. C. 198; *Farmer v. Farmer*, 1 H. L. Cas. 724; *Boyse v. Rossborough*, 6 H. L. Cas. 2, 49.



well as by equity, in all things which are for their benefit, and are saved from being prejudiced by anything to their disadvantage. But this rule is designed as a shield for their own protection, and not as a means to perpetrate a fraud or injustice on others; at least, not where courts of equity have authority to reach it in cases of meditated fraud (*p*). Also, an infant may make a valid gift of his property when he is fully capable of managing his own affairs, and there is no influence brought to bear upon him in making the gift (*q*).

There is an important difference between the acts and contracts of infants on the one hand, and those of lunatics, idiots, &c., on the other. The act or contract of a lunatic or idiot is *ab initio* void, and can never be validated in any mode. But in regard to the acts and contracts of infants, some are wholly void, others are merely avoidable. Where they are utterly void, they are from the beginning mere nullities, and incapable of operation. But where they are voidable, it is in the election of the infant to avoid them or not when he arrives at full age. In general, where a contract may be for the benefit or to the prejudice of an infant, he may avoid it as well at law as in equity. Where it can never be for his benefit, it is utterly void; and under the Infants' Relief Act, 1874 (*r*), money-lending and money-raising contracts, and all other contracts (not being for necessities) are made utterly void, and not confirmable by the infant upon his attaining his full age.

6. *Femes covert*  
have not a  
general capa-

6. In regard to *femes covert* the case is still stronger; for, generally speaking, at law they have no capacity

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(*p*) *Lempriere v. Lange*, W. N. 1879, 158.

(*q*) *Taylor v. Johnston*, 19 Ch. Div. 603.

(*r*) 37 & 38 Vict., c. 62. See *Coxhead v. Mullis*, 3 C. P. Div. 439, distinguished in *Northcote v. Doughty*, 4 C. P. Div. 385.

to do any acts or to enter into any contracts, and such acts and contracts are treated as mere nullities. Courts of equity, however, have broken in upon this doctrine, and have in many respects treated the wife as capable of disposing of her own separate property, and of doing other acts, as if she were a *feme sole*. In cases of this sort, the same principles will apply to the acts and contracts of a married woman as would apply to her as a *feme sole*, unless the circumstances give rise to a presumption of fraud, imposition, unconscionable advantage, or undue influence. And now, under the Married Women's Property Act, 1870, and the Married Women's Property Act, 1882, a married woman may maintain an action in her own name for the recovery, and has the same remedies, civil as well as criminal, for the protection of property declared by the Act to be her separate property, as though she were a *feme sole* (s).

city to contract at law, but may do so as to their separate estate in equity, and as to their statutory separate estate both at law and in equity.

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(s) 33 & 34 Vict., c. 93, s. 11; and 45 & 46 Vict., c. 75, s. 12.

## CHAPTER IV.

### CONSTRUCTIVE FRAUD.

Constructive  
fraud.

By Constructive Frauds are meant such acts or contracts as, although not originating in any actual design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as being acts and contracts done *malo animo*.

Three classes.

The cases under this head may be divided into three classes.

I. Cases of constructive fraud, so called because they are contrary to some *general public policy, or to the policy of the law*.

II. Constructive frauds, which arise from the abuse of some peculiar, confidential, or fiduciary relation between the parties.

III. Constructive frauds which unconscientiously compromise, or injuriously affect, or operate substantially as frauds upon the private rights, interests, duties, or intentions of the parties themselves, or of third persons.

I. Cases of constructive fraud, so called because they

are contrary to some general public policy, or to some fixed artificial policy of the law.

I. Constructive frauds as contrary to policy of the law.

Marriage brokerage contracts, by which a person engages to give another some reward or remuneration if he will negotiate a marriage for him, are utterly void (a) and incapable of confirmation (b); and money paid pursuant to such contracts may be recovered back in equity (c).

(1.) Marriage brokerage contracts.

On the same principle, every contract by which a parent or guardian obtains any remuneration for promoting or consenting to the marriage of his child or ward is void (d).

(2.) Reward to parent or guardian to consent to marriage of child.

The same principle pervades that class of cases where persons, upon a treaty of marriage, by any concealment or misrepresentation, mislead other parties or do acts which are by other secret agreements reduced to mere forms, or become inoperative. Thus, where a man, on the treaty for the marriage of his sister, let her have money privately, in order that her portion might appear as large as was insisted on by the intended husband, and she gave a bond to her brother for the repayment of it, it was decreed to be delivered up (e).

(3.) Secret agreements in fraud of marriage.

The same rules are applied to cases where bonds are given, or other agreements made, as a reward for using influence and power over another person to induce him to make a will in favour of the obligor, and for his benefit; for all such contracts tend to

(4.) Rewards given for influencing another person in making a will.

(a) *Hall v. Potter*, Show, P. C. 76.

(b) *Cole v. Gibson*, 1 Ves. Sr. 503; *Roberts v. Roberts*, 3 P. Wms. 74.

(c) *Smith v. Bruning*, 2 Vern. 392.

(d) *Keat v. Allen*, 2 Vern. 588.

(e) *Gale v. Lindo*, 1 Vern. 475; *Palmer v. Neave*, 11 Ves. 165; *Redman v. Redman*, 1 Vern. 348; *Neville v. Wilkinson*, 1 Bro. C. C. 543.

deceive and injure others, and encourage artifices and improper attempts to control the exercise of their free judgment (*f*).

(5.) Contracts in general restraint of marriage void.

Contracts in general restraint of marriage are void, as against public policy, and the due economy and morality of domestic life; and so, if a condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration. Thus, where a legacy was given to a daughter, on condition that she should not marry a man who was not seised of an estate in fee-simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage (*g*). *In re* *Widdowson*

(6.) Contracts in general restraint of trade void, but not special restraints.

Contracts in general restraint of trade are also void, as tending to promote monopolies, and to discourage industry, enterprise, and just competition. But the same reasoning does not apply to a limited restraint of trade, *e.g.*, not to carry on trade at a particular place, or with particular persons, or for a limited reasonable time; and a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret (*h*).

(7.) Agreements founded on violation of public confidence.

In like manner, agreements which are founded upon violations of public trust or confidence, or of the rules adopted by courts in furtherance of the administration of public justice, are held void. Thus, contracts for

(*f*) *Debenham v. Ox*, 1 Ves. 276.

(*g*) *Keily v. Monck*, 3 Ridg. P. C. 205; *Scott v. Tyler*, 2 L. C. 115.

(*h*) *St.* 292; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Benwell v. Inns*, 24 Beav. 307; *Harms v. Parson*, 32 Beav. 328.

the buying, selling, or procuring of public offices (i), As buying and selling offices. agreements founded on the suppression of criminal prosecutions (j), contracts which have a tendency to encourage champerty (k), and generally all agreements founded upon corrupt considerations or moral turpitude, whether they stand prohibited by statute or not, are treated as frauds upon public policy or public law.

- ✓ By the Companies Act, 1862, s. 22, shares in joint-stock companies are made freely transferable, the mode of transfer being that prescribed by the regulations of the company. But a transfer that is subject to some reservation in favour of the transferor is no transfer, so as to get rid of liability for calls; such a pretended transfer is, in fact, fraudulent (l). Also, when the directors have (as they usually have) a right of rejecting proposed transferees, any concealment or misrepresentation materially affecting the worth of the proposed transferee would be an *actual* fraud, and not constructive merely, and would render the transfer invalid (i.e., voidable) even although accepted (m); but it is otherwise when the directors have no power of rejection (n). (8.) Frauds, in relation to the transfer of shares in joint-stock companies.

And again, as between trustees and *cestuis que trust*, the trustee whose name is on the register is liable, and not the *cestui que trust*, but the trustee (where the investment is proper) has the usual right of indemnity (o); but where the shares are placed in the name of the trustee only colourably, and for the purpose of

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(i) *Chesterfield v. Janssen*, 1 Atk. 352; *Hartwell v. Hartwell*, 4 Ves. 811.

(j) *Johnson v. Ogilby*, 3 P. Wms. 277.

(k) *Powell v. Knowler*, 2 Atk. 224; *Reynell v. Sprye*, 1 De G. M. & G. 660.

(l) *De Pass's Case*, 4 De Gex. & Jo. 544; *Hyam's Case*, 1 D. F. & J. 75.

(m) *Ex parte Kintrea*, L. R. 5 Ch. App. 95.

(n) *Battie's Case*, 39 L. J. Ch. 391.

(o) *City of Glasgow Bank Cases*, 4 App. Ca. 547-581.

merely evading the legal liability, the *cestui que trust* would be liable (*p*).

Neither party to an illegal agreement is aided, as a general rule.

Except where agreement is contrary to public policy.

In general, where parties are concerned in illegal agreements, whether they are *mala prohibita* or *mala in se*, courts of equity, following the rule of law as to participators in a common fraud, will not interpose to grant any relief, acting upon the well-known maxim, *In pari delicto potior est conditio possidentis* (*q*). But in cases where the agreement is repudiated on account of its being against public policy, the circumstance that the relief is asked by a party who is *particeps fraudis* is not in equity material. The reason is, that the public interest requires that relief should be given, and it is given to the public through the party (*r*), and not to the party, excepting as an indirect consequence occasionally.

II. Constructive frauds arising from the fiduciary relation.

II. Constructive frauds which arise from the abuse of some peculiar, confidential, or fiduciary relation between the parties.

In this class of cases there is often to be found some intermixture of deceit, imposition, over-reaching, unconscionable advantage, or other mark of direct fraud. But the principle on which courts of equity act in regard thereto stands independent of any such ingredients upon a motive of general public policy. The general principle which governs in all cases of this sort is, that if confidence is reposed, and that confidence is abused, courts of equity will grant relief.

In the first place, as to the relation of parent and

(*p*) *Cox's Case*, 4 De Gex. Jo. & Sm. 53.

(*q*) *Houison v. Hancock*, 8 Tr. 675; *Osborne v. Williams*, 18 Ves. 379.

(*r*) *St. John v. St. John*, 11 Ves. 535; *Roberts v. Roberts*, 3 P. Wms. 66; *Smith v. Bromley*, Doug. R. 696; *Rider v. Kidder*, 10 Ves. 360.

child, all contracts and conveyances whereby benefits are secured by children to their parents, or to persons who stand *in loco parentis*, are the objects of the court's jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third parties have acquired an interest under them (s). And where a child, shortly after attaining his or her majority, makes over property to his or her father without consideration, or for an inadequate consideration, equity will require the father to show that the child was really a free agent, and had adequate and independent advice (t). And conversely in a recent Canadian case, a deed of gift, executed by a father infirm in mind and body in favour of one of his sons, was ordered to be given up and cancelled (u). *H. i. m. a. k.*

(s.) Gifts from child to parent void if not in perfect good faith.

Gift by child shortly after minority.

By father when infirm in mind and body.

In the next place, as to the relation of guardian and ward. During the existence of guardianship, the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation becomes thereby actually ended, if the intermediate period be short (v), unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian (w).

(2.) Guardian and ward cannot deal with each other during the continuance of the relation.

Gift by ward soon after the termination of guardianship, viewed with suspicion.

Where, however, the influence as well as the legal

(s) *Wright v. Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133; *Baker v. Bradley*, 7 De G. M. & G. 597; *Kempson v. Ashbee*, L. R. 10 Ch. App. 15.

(t) *Savery v. King*, 5 H. L. Cas. 627; *Davies v. Davies*, 4 Giff. 417; *Hannah v. Hodgson*, 30 Beav. 19; *Bainbrigge v. Browne*, 18 Ch. Div. 188.

(u) *Mason v. Seney*, 11 Grant, U. C. Chanc. 447.

(v) *Pierce v. Waring*, 1 P. Wms. 121.

(w) *Hatch v. Hatch*, 9 Ves. 297; *Wright v. Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133.



Gift upheld when influence and legal authority have ceased.

authority of the guardian over the ward have completely ceased, and the ward has been put in possession of his property after a full and fair settlement of accounts, equity will not interfere to set aside a reasonable gift to the guardian (x).

(3.) *Quasi* guardians. Medical advisers. Ministers of religion.

The same principles are applied to persons standing in the situation of *quasi* guardians, or confidential advisers, as medical advisers (y), or ministers of religion (z), and to every case where influence is acquired and abused, where confidence is reposed and betrayed (a).

(4.) Solicitor and client.

In the next place, as to the relation between solicitor and client. In *Tomson v. Judge* (b), A., who was proved to have entertained feelings of peculiar personal regard for B., his solicitor, conveyed to him certain real estate by a deed purporting to be a purchase-deed; the consideration was expressed to be £100, the value of the real estate being upwards of £1200. B. produced evidence to show that no money passed; that the transaction was never intended to be a purchase, but a gift for his services, and from affection. It was held that the rule is absolute *that a solicitor cannot sustain a gift from his client*, made pending the relation of solicitor and client, and the deed was set aside. Kindersley, V.C., said:—Now, as to the cases of PURCHASES by solicitors from their clients, there is no rule of this court to the effect that a solicitor cannot make such a purchase. A solicitor can purchase his client's property even while the relation subsists; but the rule of the court is that

A gift from client to solicitor pending that relation cannot stand. A purchase from client, if there is perfect *bond fides*, is good.

(x) *Hyllon v. Hyllon*, 2 Ves. Sr. 549; *Hatch v. Hatch*, 9 Ves. 297.

(y) *Dent v. Bennett*, 4 My. & Cr. 269.

(z) *Nottidge v. Prince*, 2 Giff. 246.

(a) *Smith v. Kay*, 7 H. L. Cas. 751; *Lyon v. Home*, L. R. 6 Eq. 655.

(b) 3 Drew. 306. See also *Morgan v. Minett*, L. R. 6 Ch. Div. 638. *Clarke v. Girdwood*, 7 Ch. Div. 9.

such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to show that the transaction was perfectly fair, that the client knew what he was doing, and in particular that a fair price<sup>v</sup> was given, and of course that no kind of advantage was taken by the solicitor. If the solicitor shows that the transaction was fair and clear, there is no difference between a purchase by him and a stranger. Is the rule with regard to gifts precisely the same, or is it more stringent? Less stringent it cannot be. There is this obvious distinction between a gift and a purchase. In the case of a purchase, the parties are at arm's length, and each party requires from the other the full value of that which he gives in return. In case of a gift the matter is totally different, and it appears to me that there is a far stricter rule established in this court with regard to GIFTS than with regard to purchases; and that the rule of this court makes such transactions, that is, of a gift from a client to the solicitor, absolutely void" (c).

X It is an established rule, therefore, that a solicitor shall not in any way whatever, in respect of any transactions in the relations between him and his client, make any gain to himself at the expense of his client, beyond the amount of his just and fair professional remuneration (d). Solicitor must make no more advantage than his fair professional remuneration.

An agreement between a solicitor and client, that a gross sum shall be paid for costs for business already done, is valid. But in this case it behoves the solicitor to use great caution, and to preserve sufficient evidence that it was a fair transaction, and that his client was Agreement to pay a gross sum for past business is valid.

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(c) *Holman v. Loynes*, 18 Jur. 843; *Welles v. Middleton*, 1 Cox. 112; *Hatch v. Hatch*, 9 Ves. 292; *Spencer v. Topham*, 22 Beav. 573; *Gresley v. Mousley*, 4 De G. & Jo. 78; *Lewis v. Hillman*, 3 H. L. Cas. 630.

(d) *Tyrrell v. Bank of London*, 10 H. L. Cas. 26; *O'Brien v. Lewis*, 4 Giff. 221; *McCann v. Dempsey*, 1 Gr. 192.

And for future business under 33 & 34 Vict., c. 28.

not under the influence of the pressure arising from the relation of solicitor and client (*e*),—a pressure characterised by Lord Thurlow (*f*) as “the crushing influences of the power of an attorney who has the affairs of a man in his hand.” An agreement by a solicitor to receive a fixed sum for costs for future business was formerly invalid, and would have been set aside even after payment under the agreement (*g*); but under 33 & 34 Vict., c. 28, s. 4, and also under 44 & 45 Vict., c. 44, § 8, a solicitor may contract with his client as to his remuneration for future services, but every such contract is subject to taxation as a bill of costs, and may (if improper) be set aside.

(5.) Trustee and *cestui que trust*. Trustee must not place himself in a position inconsistent with the interests of the trust. Purchase by trustee from *cestui que trust* cannot be upheld.

In the next place, with regard to the relation of trustee and *cestui que trust*, it may be laid down as a general rule, that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it. It is a consequence of this rule that a purchase by a trustee from his *cestui que trust*, even although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust*; and, as observed by Lord Eldon (*h*), “it is founded upon this, that though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court (by which I mean in the power of the parties), in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys an estate, and by the knowledge acquired in that character discovers a valuable coal-mine under it, and, locking that up in his own breast, enters into

(*e*) *Morgan v. Higgins*, 1 Giff. 277.

(*f*) *Welles v. Middleton*, 1 Cox. 125.

(*g*) *In re Newman*, 30 Beav. 196.

(*h*) *Ex parte Lacey*, 6 Ves. 627.

a contract with the *cestui que trust*; if he chooses to deny it, how can the court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded" (i).

It has been decided, however, that "a trustee may buy from the *cestui que trust*, provided there is a clear and distinct contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee" (j). And, in fact, the rule as expressed by Lord Eldon in the words quoted above, would at the present day hold good (if at all) in the case only of a trustee *for sale* purchasing from his *cestui que trust* without the leave of the court to bid.

Except on a clear and distinct and fair contract, that the *cestui que trust* intended the trustee to purchase.

But although it is a general rule that a trustee cannot except in exceptional cases purchase from himself, as it has been said, there is no objection to his purchasing from his *cestui que trust*, who is *sui juris*, and who has discharged him from the obligation which attached upon him as a trustee; but even such a transaction will be watched by the court "with infinite jealousy" (k).

Trustee may purchase from *cestui que trust* who is *sui juris*, and has discharged him.

A trustee is never permitted to partake of the bounty of his *cestui que trust*, except under circumstances which would make the same valid, if it were a case of guardianship. The relation must have in fact ceased, and it must be proved that the influence arising from that relation has also ceased.

Gift to trustee treated on same principles as one between guardian and ward.

(i) *Hamilton v. Wright*, 9 C. & F. 111, 123-5; *Ingle v. Richards*, 28 Beav. 361; *Randall v. Errington*, 10 Ves. 423; *Campbell v. Walker*, 5 Ves. 682; 13 Ves. 601.

(j) *Coles v. Trecothick*, 9 Ves. 234; *Denton v. Donner*, 23 Beav. 285.

(k) *Ex parte Lacey*, 6 Ves. 626; *Fox v. Mackreth*, 1 L. C. 123.

(6.) Principal and agent.

Entire good faith and complete disclosure necessary in dealings between principal and agent.

Agent cannot make any secret profit out of his agency.

In the next place, as to the relation of principal and agent, the same principles are generally applicable. Agents are not permitted to become secret vendors or purchasers of property which they are authorised to buy or sell for their principals (l), or indeed to deal validly with their principals in any case *except where there is the most entire good faith, and full disclosure of all facts and circumstances*, and an absence of all undue influence, advantage, or imposition (m). And if an agent employed to make a purchase, purchase for himself, he will be held a trustee for his principal (n). Nor will an agent employed to purchase be permitted, unless by the plain and express consent of his principal, to make any profit out of the transaction (o).

(7.) Miscellaneous fiduciary persons. Counsel, auctioneers, &c.

And the principles which apply to trustees, agents, and others apply with almost equal force to other persons standing in confidential or fiduciary situations, as to counsel, agents, assignees, and solicitors of a bankrupt's estate, auctioneers, and creditors who have been consulted as to the sale, and also to physicians (p), and others being shown to have occupied such situations.

Debtor, creditor, and sureties.

Entire good faith is required between debtor and creditor and sureties. And if a creditor does any act affecting the surety, or if he omits to do any act which he is required to do by the surety, and is bound

(l) *Lowther v. Lowther*, 13 Ves. 103; *Charter v. Trevelyan*, 11 C. & F. 714; *Walsham v. Stainton*, 1 De G. J. & S. 678.

(m) St. 315; *Daily v. Wonham*, 33 Beav. 154; *De Bussche v. Alt*, 8 Ch. Div. 286.

(n) *Lees v. Nuttall*, 1 Russ. & My. 53; *Taylor v. Salmon*, 4 My. & Cr. 134.

(o) *East India Co. v. Henchman*, 1 Ves. Jr. 289; *Bentley v. Craven*, 18 Beav. 75; *Tyrrel v. Bank of London*, 10 H. L. Cas. 26; *Beck v. Kantorowicz*, 3 K. & J. 230; *The Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189.

(p) *Pooley v. Quilter*, 2 De G. & Jo. 327; *Carter v. Palmer*, 8 C. & Fin. 657; *Ex parte Holyman*, 8 Jur. 156; *Kerr v. Bain*, 11 Gr. 423; *M'Pherson v. Watt*, L. R. 3 App. 254; *Mitchell v. Homfray*, 8 Q. B. D. 587.

to do, and that act or omission proves injurious to the surety; or if the creditor enters into any stipulations with the debtor unknown to the surety, and inconsistent with the terms of the original contract, the surety may set up such act, omission, or contracts, as a defence to any suit brought against him in law or equity (g).

III. Constructive frauds which unconscientiously compromise or injuriously affect or operate substantially as frauds upon the private rights, interests, or duties of the parties themselves, or of third persons.

III. Constructive frauds, as being unconscientious or injurious to the rights of third parties.

To this class may be referred many of those cases arising under the Statute of Frauds, which requires certain contracts to be in writing to give them validity. In the construction of that statute, a general principle has been adopted, that as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, in a variety of cases, where, from fraud, a contract of this sort has not been reduced into writing, but has been suffered to rest in confidence or in parol communications between the parties, courts of equity will enforce it against the party guilty of a breach of confidence, who attempts to shelter himself behind the provisions of the statute (r).

(1.) If contract not put into writing through fraud of a party, he cannot set up Statute of Frauds as a defence.

Common sailors being so extremely generous, improvident, and credulous, and therefore liable to be imposed upon, equity views their contracts respecting wages and prize-money with great jealousy; and generally grants them relief whenever any inequality appears in the bargain, or an undue advantage has been taken (s).

(2.) Common sailors,—contracts by.

(g) Sm. Man. 84.

(r) *Montacute v. Maxwell*, 1 P. Wms. 619; *Att.-Gen. v. Sitwell*, 1 You. & Coll. Exch. Ca. 583; *Hussey v. Horne Payne*, 4 App. Ca. 311.

(s) *Dow v. Wheldon*, 2 Ves. Sr. 516.

(3.) Bargains with heirs and expectants.

Bargains with heirs, reversioners, and expectants, during the life of their parents or ancestors, will be relieved against, unless the purchaser can show that a fair price was paid; for fraud in this class of cases is usually though not always presumed from inadequacy of price (*t*). And this rule is founded on good sense. The very fact of the expectant coming into the market to sell his expectancy shows that he is not in a position to make his own terms, and that he is more or less in the power of the purchaser; in all such cases, therefore, actual distress need not be proved; a court of equity presumes that there is distress, and that is equivalent to saying that the party has not that full power of deliberate consent which is essential to a valid contract. The onus, therefore, lies upon the person dealing with the reversioner or expectant to show that the transaction is reasonable and *bonâ fide*.

Jurisdiction under 31 & 32 Vict., c. 4.

The jurisdiction of courts of equity in these cases is not affected by the 31 & 32 Vict., c. 4, which enacts that no purchase made *bonâ fide* of a reversionary interest shall be set aside *merely on the ground of under value* (*u*).

Knowledge of person standing in loco parentis does not per se make such transactions valid.

It would seem that the fact that the father or other person standing *in loco parentis* was aware of or took part in the transaction does not necessarily make that valid which would otherwise be void. It will at the most raise a presumption in favour of the *bona fides* of the parties. If, therefore, a father, being unable to supply his son's necessities, assists and protects him in raising money from strangers, the son, in such a case, having in his father's advice presumptively the

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(*t*) *Peacock v. Evans*, 16 Ves. 512; *Hincksman v. Smith*, 3 Russ. 433; *Aylesford v. Morris*, L. R. 8 Ch. 484; *In re Slater's Trusts*, 11 Ch. Div. 227.

(*u*) *Miller v. Cook*, L. R. 10 Eq. 641; *Tyler v. Yates*, L. R. 11 Eq. 265; L. R. 6 Ch. 665; *Nevill v. Snelling*, 15 Ch. Div. 679.

best security for obtaining the fair market value of what he sells, the court may perhaps infer that a bargain made under such circumstances was fair and for full value (v).

It is upon similar principles that *post obit* bonds, <sup>(4.)</sup> *Post obits.* and other securities of a like nature, are set aside when made by heirs and expectants. A *post obit* bond is an agreement, on the receipt of ready money by the obligor, to pay a sum exceeding the sum so received, and the ordinary interest thereof, on the death of the person from whom he, the obligor, expects to become entitled to some property. If in other respects these contracts are perfectly fair, courts of equity will permit them to have effect as securities for the sum to which *ex æquo et bono* the lender is entitled; for he who seeks equity must do equity.

Where tradesmen and others have sold goods to young and expectant heirs at extravagant prices, <sup>(5.)</sup> *Tradesmen selling goods at extravagant prices.* and under circumstances demonstrating imposition or undue advantage, or an intention to connive at secret extravagance, courts of equity have reduced the securities, and cut down the claims to their reasonable and just amount.

In all those cases where, after the pressure of necessity has been removed, the party freely and deliberately, <sup>The party injured may acquiesce after the pressure of necessity has ceased.</sup> and upon full information, confirms the precedent contract or other transaction, courts of equity will generally hold him bound thereby; for if a man is fully informed and acts with his eyes open, he may, by a new agreement, bar himself from relief.

Another class of constructive frauds consists of those <sup>(6.)</sup> *Knowingly producing a false impres-* cases where a man designedly or knowingly produces

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(v) *King v. Hamlet*, 2 My. & K. 456; *Talbot v. Staniforth*, 1 J. & H. 502; *King v. Savery*, 1 Sm. & G. 271; 5 H. L. Cas. 627.



sion to mislead a third party.

One who enables another to commit a fraud is answerable. A man who has a title to property standing by and letting another purchase or deal with it, is bound.

Even though there be no fraud, but only forgetfulness.

a false impression on another, who is thereby drawn into some act or contract injurious to his own rights or interests. There can be no real difference in effect between an express representation and one that is naturally or necessarily implied from the circumstances.

The wholesome maxim of the law is, that the party who enables another to commit a fraud is answerable for the consequences (w); and the maxim, *Fraus est celare fraudem*, is, with proper limitations in its application, a maxim of general justice (x). Thus, if a man having a title to an estate which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, the former so standing by will be bound by the sale (y). On the occasion of a loan upon the security of a lease, which the borrower represented himself as entitled to have granted to him for ninety-nine years, the lender required a written intimation from the alleged lessor of his intention to grant the lease. The lessor, being apprised of the requisition and its object, signed the required intimation. The loan was made upon the faith of it, and afterwards the lessor granted a lease, which was then mortgaged by the borrower to the lender. It turned out that the lessor had, some time before, demised the same premises for the same term to the borrower, by whom it had since been assigned for value. It was held that the court had jurisdiction to direct repayment by the lessor to the lender of the sum which he had advanced, with interest, although the lessor was not shown to have been guilty of any conscious active fraud, or of having done more than *forgotten the previous lease* when he made the misrepresentation and granted

(w) *Rice v. Rice*, 2 Drew. 73.

(x) *Rodgers v. Rodgers*, 13 Gr. 143.

(y) *Teasdale v. Teasdale*, Sel. Ch. Cas. 59; *Cawdor v. Lewis*, 1 You. & Coll. Ex. Ca. 427; and see especially *Willmott v. Barber*, 15 Ch. Div. 96.

the second lease (z). In this case the borrower was, of course, guilty of an actual fraud; but the alternative and more direct remedy against him was probably worthless.

Agreements whereby parties engage not to bid against each other at a public auction, especially where the same is directed or required by law, are held void, for they are unconscientious, and have a tendency to cause the property to be sold at an undervalue. On the other hand, if underbidders or puffers are employed at an auction to enhance the price and to deceive other bidders, and they are in fact misled, the sale will be held void as against public policy (a). But now by 30 & 31 Vict. c. 48, s. 6, the vendor, if he reserves to himself the right in the particulars or conditions of sale, may bid in person or by one agent at the sale (b).

(7.) Agreements at auctions not to bid against one another.

Puffer at sale by auction.

Under 30 & 31 Vict., c. 48.

If a creditor who is party to a composition deed has obtained a secret and undue advantage as a condition of signing the deed, and has thus decoyed other innocent and unsuspecting creditors into signing the deed of composition, which they supposed to be founded upon the basis of entire equality and reciprocity among all the creditors, it is a fraud upon the policy of the law. And such secret arrangements are utterly void, even as against the assenting debtor or his sureties, and money paid under them is recoverable back (c).

(8.) Fraud upon consenting creditors to a composition deed.

In every transaction where a person obtains by donation a benefit from another to the prejudice of that other person, and to his own advantage, if the

(9.) A person obtaining a donation must always be pre-

(z) *Slim v. Croucher*, 1 De G. F. & Jo. 518.

(a) *Sugd. V. & P.* 9.

(b) *Gilliat v. Gilliat*, L. R. 9 Eq. 60.

(c) *Mare v. Sandford*, 1 Giff. 288.

pared to prove *bona fides*. transaction should afterwards be questioned, he should be able to prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect (*d*). But the cases have not gone so far as to show that the donee, under a voluntary settlement, where no power of revocation is reserved, has thrown upon him in the first instance the onus of showing that the settlement was intended by the donor to be irrevocable (*e*).

(10.) A power must be exercised *bona fide* for the end designed. Secret agreement in fraud of object of power.

"No point is better established than that a person having a power of appointment must exercise it *bona fide* for the end designed, otherwise it is corrupt and void" (*f*). Hence when a parent, having a power of appointment among his children, appoints to one or more of them to the exclusion of the others, *upon a bargain for his own advantage*, equity will relieve against the appointment on the ground of fraud, as where there is a secret understanding that the child should assign a part of the fund to a stranger (*g*), or to the father's debtors (*h*). So again if a parent, having a power to raise portions for children, and even to fix the time when they are to be raised, appoints to a child during infancy, and while not in want of a portion, and the death of the child is at the time of the appointment expected, he will not be allowed, on the child's death, to derive any benefit from the appointment as the personal representative of that child (*i*).

Appointment by a father to a sickly infant.

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(*d*) *Cooke v. Lamotte*, 15 Beav. 240; *Anderson v. Elsworth*, 3 Giff. 154.

(*e*) *Coutts v. Acworth*, L. R. 8 Eq. 558; *Wollaston v. Tribe*, L. R. 9 Eq. 44, explained in *Hall v. Hall*, L. R. 8 Ch. App. 430; and see *Henry v. Armstrong*, 18 Ch. Div. 668. (*f*) *Aleyn v. Belchier*, 1 L. C. 415.

(*g*) *Daubeny v. Cockburn*, 1 Mer. 626.

(*h*) *Farmer v. Martin*, 2 Sim. 502; *Carver v. Richards*, 1 De G. F. & Jo. 548; *Salmon v. Gibbs*, 3 De G. & Sm. 343.

(*i*) *Hinchenbroke v. Seymour*, 1 Bro. C. C. 394; *Wollesley v. Mornington*, 2 K. & J. 143; *Roach v. Trood*, L. R. 3 Ch. Div. 429; explained in *Henty v. Wrey*, 19 Ch. Div. 492.

When the exercise of a power of appointment is void on the ground of fraud (or of illegality), if any part of it is free of the fraud (or illegality), and that part is severable, it will be and remain valid, notwithstanding the failure of the exercise of the power as to the other part or parts (*j*). A void appointment,—good in part, if severable.

Formerly, where a person having a power of appointing property among the members of a class, although with full discretion as to the amount of their respective shares, exercised that power by appointing to one or more of the objects a merely nominal share, such an appointment, although valid at law, was set aside as an illusory appointment, not being exercised *bonâ fide* for the end designed by the donor (*k*). In consequence of the great difficulty and conflict of authority as to what might be deemed a nominal or illusory share, the Legislature interfered in the year 1830, and established in effect that no appointment shall be invalid on the ground merely that an unsubstantial, nominal, or illusory share of the property has been appointed to the objects of the power (*l*). As a consequence of this Act, the appointor might have cut off any appointee "with a shilling," as the phrase went; and now, under the Powers Amendment Act, 1874 (*m*), the appointor need not now appoint any share at all to any particular appointee, but may cut him off even without the shilling. Doctrine of illusory appointments.  
  
Abolished by 1 Will. IV., c. 46.

"A man who has induced another to enter into a contract with him by representing an actual state of things as a security for the enjoyment of an interest which he has himself created for valuable considera- (11.) A man representing a certain state of facts as inducement to a contract,

(*j*) *Aleyn v. Belchier*, *supra*.

(*k*) *Wilson v. Piggett*, 2 Ves. Jr. 351.

(*l*) 1 Will. IV., c. 46; 1 Sudg. on Pow. 545.

(*m*) 37 & 38 Vict., c. 37. See *In re Capon's Trusts*, W. N. 1879, p. 25.

cannot derogate from it by his own act.

tion, is not at liberty by his own act to derogate from that interest by determining the state of things which he so held forth as the consideration or inducement for entering into the contract" (n).

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(n) *Piggott v. Straton, Johnson*, 341; 1 De G. F. & J. 33.

*A has the power of appointing proxy as he may choose. He mortgages and assigns to B, saying to B that he has appointed proxy for himself. He cannot afterwards appoint to another —*

## CHAPTER V.

## SURETYSHIP.

THE contract of suretyship requires the utmost good faith between all the parties to it; for they do not deal with one another at arm's length, as in ordinary contracts. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract (a).

Utmost good faith required between all parties.

It is a question even now not quite settled (or at least not generally or readily understood) as to what concealment of facts—what degree of *suppressio veri*—by the creditor is necessary to annul the obligation of the contract of suretyship. Story lays down broadly that "if a party taking a guarantee from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to fraud;" and this broad assertion of the rule is no doubt supported by the decided cases, although some of them seem very much to narrow the foundation of the doctrine, and to point to the conclusion that the mere concealment of facts affecting the surety is not in itself a ground for rescinding the contract, unless either the party concealing them

What concealment of facts by creditor releases surety? The general principle.

(a) *Davis v. London and Provincial Marine Insurance*, 8 Ch. Div. 469.

(1.) Either the fact must have been one which the creditor was under an obligation to discover. *Hamilton v. Watson.*

was under some obligation to disclose them, or the concealed facts themselves go directly and proximately to increase the liability of the surety. Thus, in the case of *Hamilton v. Watson* (b), it appeared that A. became indebted to the B. Company in the sum of £750; that the B. Company amalgamated with the G. Company, and the latter company took on itself the rights and liabilities of the former. On the G. Company calling on A. for payment of the debt due from him, A. entered into a bond, with H. as a surety, by which a new cash account should be opened with the G. Company to the amount of £750, H. not being informed of the previous debt. A week after the date of the bond, A. drew out a draft upon the new account with the G. Company for the whole £750 for which H. had become bound, and paid off with it the old debt due to the B. Company. It was held that this was not a sufficient concealment of facts to discharge the surety—that the mere circumstance of the parties supposing that the money was intended to be applied to a particular purpose did not appear to vitiate the transaction at all—that *the creditor was under no obligation to* volunteer a disclosure of any transaction that passed between him and the other party—that if X the surety would guard against particular perils, he must put the question and gain the information required—and that the true criterion as to whether any disclosure ought to be made voluntarily was to inquire whether there was anything that might not naturally be expected to take place between the parties—that is, whether there was a contract between the debtor and creditor to the effect that his position X should be different from that which the surety might naturally expect. And in these respects the contract of suretyship is widely different from the contract of insurance, for so long as the amount of the liability is

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(b) 12 CL. & FIN. 109.

not increased, it has been decided that the rule which governs insurances on ships and on lives as to the concealment of facts does not apply to common suretyships or guaranties, *scil.* because in insurances on ships or lives, the assured knows, and the underwriter does not know, the circumstances of the voyage or the state of health (c); and besides, assurers and assureds are intrinsically different from sureties and creditors.

On the other hand, there are cases where it has been held that a concealment of a material fact, part of the immediate transaction, discharges the surety. Thus, in *Pidcock v. Bishop* (d), where it appears to have been agreed between the vendors and the vendee of goods that the latter should pay 10s. per ton beyond the market price, in liquidation of an old debt due to one of the vendors, and the payment of the goods was guaranteed in the following words:—"I will guaranty you in the payment of £200 value, to be delivered to Tickell, in Lightmoor pig-iron;" and this private bargain between the parties was not communicated to the surety,—it was held that this was a fraud on the surety,—that a party giving a guarantee ought to be informed of any private bargain between the vendor and the vendee which might have the effect of varying his responsibility—that the effect of the transaction would be to compel the vendor to appropriate to the payment of the old debt a portion of those funds which the surety might reasonably suppose would go towards defraying the debt (*scil.* the value of the pig-iron supplied), for the payment of which he had made himself collaterally liable, and that such a bargain therefore increased his responsibilities (e).

Or (2.) the material fact concealed must have been an integral part of the immediate transaction.

A creditor is not in general bound to inquire into

(c) *North British Insurance Co. v. Lloyd*, 10 Exch. 523; *Wythes v. Labouchere*, 3 De G. & Jo. 593.

(d) 3 B. & C. 605.

(e) *Malby's Case*, cited 1 Dow. 294.



Creditor not bound to inquire as to circumstances of suretyship, if there is no ground to suspect fraud on surety; *secus*, if reasonable ground of suspicion.

the circumstances under which a person becomes surety to him for a debt, but in exceptional circumstances he is so bound to inquire; for example, where the dealings between the parties are such as would reasonably create a suspicion in his mind that a fraud is being practised upon the surety. Thus, in *Owen v. Homan (f)*, A. being largely indebted to B. & Company, and being on the verge of bankruptcy, brought them, on different occasions, bills, &c., signed by himself and his aunt, as surety. The aunt was, to the knowledge of B. & Company, a married woman, aged seventy-five, and living apart from her husband. It was held that the circumstances were such as reasonably to create in the minds of the bankers a suspicion of fraud on the part of the debtor towards his aunt; and that they could not therefore shelter themselves under the plea that they were not called on to ask, and did not ask, any questions on the subject (g).

Rights of creditor against surety regulated by the instrument of guaranty.

The rights of the creditor as against the principal debtor may or may not depend upon the instrument of guaranty; but the rights of the creditor as against the surety are wholly regulated by the terms of that instrument. When an obligation exists only in virtue of a covenant, its extent can be measured only by the words in which the covenant is expressed (h). In all cases, therefore, where a surety is bound by a joint-bond, the court will not reform the joint-bond so as to make it several, upon the presumption of a mistake from the nature of the transaction; but it will require positive proof of an express agreement by the surety that it should be several as well as joint (i). And so also the duration of the guaranty or contract of suretyship, and whether or not it is determined by the

(f) 4 H. L. Cas. 997.

(g) *Mailland v. Irving*, 15 Sim. 437.

(h) *Sumner v. Powell*, 2 Mer. 35, 36.

(i) *Rawstone v. Parr*, 3 Russ. 424, 539.

death of the guarantor or surety, and notice of such death, appears to be wholly a question of construction (*j*). But it would not follow that because the principal debtor was not bound (*e.g.*, on the ground of illegality in the contract), therefore the surety also was not bound; and the contrary appears to be the fact (*k*).

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It would seem that a surety cannot compel the creditor to proceed against the debtor, and practically there is no hardship in the case (*l*); for at any moment after the debt becomes payable, the surety may himself pay off the creditor, and proceed against the debtor for the money so paid (*m*).

Surety cannot compel creditor to proceed against debtor.

But, on the other hand, a surety has a right to come into equity, to take proceedings in the nature of *quia timet*, to compel the debtor to pay the debt when due, whether the surety has actually been sued on it or not; for it is "unreasonable that a man should always have a cloud hanging over him" (*n*). But this right only arises where the creditor has a present right to sue his debtor, and refuses to exercise that right (*o*).

Remedies available for surety.  
(1.) Bill *quia timet* to compel payment by debtor.

Similarly a surety may file a bill for a declaration that his liability is at an end, where the course of dealing between principal debtor and creditor has operated as a release (*p*).

(2.) Judicial declaration that surety discharged.

Where the surety pays the debt on behalf of the principal debtor, the rule, whether at law (*q*) or in

(3.) Action for reimbursement by debtor.

(*j*) *Lloyds v. Harper*, 16 Ch. Div. 290.

(*k*) *Yorkshire Railway Wagon Co. v. Mackure*, 19 Ch. Div. 478.

(*l*) But see *Newton v. Charlton*, 10 Hare, 646.

(*m*) *Wright v. Simpson*, 6 Ves. 733.

(*n*) *Ranelagh v. Hayes*, 1 Vern. 189; *Mitford on Plead.* 172; *Antrobus v. Davidson*, 3 Mer. 569; *Woodbridge v. Norris*, L. R. 6 Eq. 410.

(*o*) *Padwick v. Stanley*, 9 Hare, 627.

(*p*) *Wilson v. Lloyd*, 21 W. R. 507; and see *Ex parte Bishop*, *In re Fox, Walker, & Co.*, 15 Ch. Div. 400.

(*q*) *Toussaint v. Martinnant*, 2 T. R. 105.

equity, is that he has a right to call upon such debtor for reimbursement. And this right has been put upon the ground of an implied contract on the part of the debtor to repay the money so paid on his account, where there is no express promise creating the right (r).

(4.) Action for delivery up of securities by creditor to surety on paying the debt.

If, in addition to the security given by the surety, the creditor has taken some additional or collateral securities from the principal debtor, courts of equity have held that upon payment of the debt by the surety to the creditor, the surety is entitled to have the benefit, not only of the principal security, but also of all those collateral securities thus given by the debtor to the creditor. Thus, for example, if at the time when the bond of the principal and surety is given, a mortgage is also made by the principal to the creditor as an additional security for the debt, then, if the surety pays the debt, he will be entitled to have an assignment of the mortgage, and to stand in the place of the mortgagee (s). But this general rule did not apply to such securities as got back upon payment to the principal debtor, and were, in fact, extinguished by the payment. Such was the case of a bond entered into by the principal debtor and surety to the creditor: on payment by the surety, the obligation on the bond ceased to exist, and consequently the surety could not stand in the shoes of the creditor as to that bond (t). But by the Mercantile Law Amendment Act (u), this exception has been abolished, and a surety is now entitled to have assigned to him every judgment, specialty, or security which shall be held by the creditor in respect of such debt, whether such judgment, &c., shall or shall not at law be deemed to have been satisfied by the payment of the

Extension of right under 19 & 20 Vict., c. 97, s. 5.

(r) *Craythorne v. Swinburne*, 14 Ves. 162.

(s) St. 499; *Hodgson v. Shaw*, 3 My. & Keen, 190.

(t) *Copis v. Middleton*, 1 T. & R. 229; *Hodgson v. Shaw*, 3 My. & K. 190.

(u) 19 & 20 Vict., c. 97, s. 5.

debt. And, *nota bene*, this right to the delivery up of collateral securities held by the creditor extends also to a surety who is such merely because of having endorsed a bill of exchange (v).

Where a debt is secured by the suretyship of two or more persons, and one surety pays the whole or part of the debt, he has in equity, and to a certain extent also at law, a right to contribution from his co-surety; and this doctrine of "contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it" (w). Hence it follows that the doctrine of contribution applies whether the parties are bound in the same or in different instruments, provided they are co-sureties for the same principal and in the same engagement, even though they are ignorant of the mutual relation of suretyship: and further, there is no difference if they are bound in different sums, except that the contribution could not be required beyond the sum for which they are respectively bound (x). And it has even been held, that a surety who has obtained from the principal debtor a counter-security for the liability he has undertaken, is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source, and that even although he consented to be a surety only upon the terms of having such counter-security, and the co-sureties, when they entered into the contract of suretyship, were ignorant of the agreement for such counter-security (y); and it would require a very special contract to deprive the co-sureties of this right.

(v) *Duncan Fox & Co. v. North and South Wales Bank*, 6 App. Ca. 1, reversing S. C. in court of appeal, 11 Ch. Div. 88.

(w) *Dering v. Winchelsea*, 1 L. C. 106; *Coope v. Twynam*, 1 T. & R. 426.

(x) *Dering v. Winchelsea*, 1 L. C. 106; *Whiting v. Burke*, L. R. 6 Ch. 342.

(y) *Steel v. Dixon*, 17 Ch. Div. 825, following *Miller v. Sawyer*, 30 Vern. 412; *Hall v. Robinson*, 8 Iredell, 56.

(5.) Action  
against co-  
sureties for  
contribution.

q

Differences between law and equity, as regards suretyship,—now abolished: (1.) Extent of remedy over for contribution.

(2.) Admission of parol evidence to show that apparent principal was surety only.

In certain respects, the jurisdiction at common law used to be, prior to the Judicature Acts, less beneficial than the jurisdiction in equity. Thus, where there were several sureties, and one became insolvent, the surety who paid the entire debt could in equity compel the solvent sureties to contribute towards payment of the entire debt (z); but at law he could recover only an aliquot part of the whole, regard being had to the original number of co-sureties (a). It seems, however, that if one of the sureties died, contribution could, and it certainly now can, be enforced against his representatives, both at law and in equity (b). Also, before equitable pleas were allowed at common law, if it did not appear on the face of the instrument that a person was a surety, but, on the contrary, it appeared that the principal debtor and the surety were bound jointly and severally and as primary debtors, parol evidence was inadmissible at law to show that the surety was only a surety (c); but in equity parol evidence was always in such a case admissible for that purpose (d). Such evidence was rendered admissible at law under an equitable defence under the C. L. P. Act, 1854 (e), and of course there is now no distinction in that or in any other respect between law and equity (f).

General principles regarding sureties:—(1.) Surety may limit his liability by express contract.

Although the doctrine of contribution is founded upon the general equity of the case, and not upon contract, still a person may by express contract take himself either wholly or partially out of the operation of that doctrine. Thus, where three persons became

(z) *Hitchman v. Stewart*, 3 Drew. 271; *Mayor of Berwick v. Murray*, 7 De G. M. & G. 497.

(a) *Cowell v. Edwards*, 2 B. & P. 268; *Batard v. Hawes*, 2 Ell. & B. 287.

(b) *Primrose v. Bromley*, 1 Atk. 88; *Batard v. Hawes*, 2 Ell. & B. 287.

(c) *Lewis v. Jones*, 4 B. & C. 506.

(d) *Craythorne v. Swinburne*, 14 Ves. 160, 170; *Clarke v. Henty*, 3 Y. & C. Ex. Ca. 187.

(e) *Pooley v. Harradine*, 7 Ell. & B. 431; *Taylor v. Burgess*, 5 H. & N. 1.

(f) Judicature Act, 1873, s. 25, sub-sect. 11.

sureties, and agreed among themselves that if the principal debtor failed to pay the debt, they should pay only their respective aliquot parts; and afterwards one of them became insolvent, and one of the remaining solvent sureties paid the whole debt, it was held that he was entitled to recover only one-third from the other solvent surety (g).

Where a surety discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the debt (h).

(2.) Surety can only charge debtor for what he actually paid.

A surety will be discharged from his liability where by acts *subsequent* to the contract for suretyship his position has been essentially changed, *scil.* worsened, without his consent. Thus, where a person gave a promissory-note as a surety, upon an agreement that the amount should be advanced to the principal debtor by draft at three months' date, and the creditor, without the concurrence of the surety, paid the amount at once; it was held that the agreement had been varied, and the surety was therefore discharged (i). But if the variation of liability is in reality in relief *pro tanto* of the surety, *e.g.*, part payment by the principal debtor being accepted by the principal creditor in discharge of the whole liability, the surety is not discharged (j).

Circumstances discharging the surety.

(1.) If creditor varies contract with debtor without surety's privity.

"If a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he dis-

(2.) If creditor gives time in a binding man-

(g) *Swain v. Wall*, 1 Ch. R. 149; *Craythorne v. Swinburne*, 14 Ves. 165; *Coope v. Twynam*, 1 T. & R. 426; and see *Steel v. Dixon*, 17 Ch. Div. 825.

(h) *Reed v. Norris*, 2 My. & Cr. 361, 375.

(i) *Bonsar v. Cox*, 6 Beav. 110; *Calvert v. Long. Dock. Co.*, 2 Keen, 638; *Evans v. Bremridge*, 2 K. & J. 174; 8 De G. M. & G. 101; *Holme v. Brunskill*, 3 Q. B. Div. 495.

(j) *Webster v. Petre*, 4 Exch. Div. 127.

ner to debtor without consent of surety, and thereby affects the remedies of the surety.

charges the surety; that is, if time is given by virtue of *positive contract* between the creditor and the principal debtor, not where the creditor is merely inactive. And the surety is held to be discharged for this reason, because the creditor by giving time to the principal has for the time at least put it out of the power of the surety to consider whether he (the surety) will have recourse to his remedy against the principal debtor or not, and because he, the surety, cannot in fact have the same remedy against the principal as he would have had under the original contract" (*k*). It seems, however, that a surety will not be discharged by the creditor's giving time to the debtor, if the creditor's remedies against the surety are not thereby diminished or affected, but are accelerated, because in such a case the surety's remedies against the principal debtor remain also unaffected (*l*).

Secus, if remedies of surety not thereby affected.

Or, if creditor giving time reserves his rights against surety.

Nor will the surety be discharged if the creditor, on giving further time to the principal debtor, *reserve* his right to proceed against the surety; "for when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial" (*m*).

(3.) If the creditor releases the

And the rule is the same when the principal debtor purports to be released, but the creditor reserves his

(*k*) *Samuell v. Howorth*, 3 Mer. 272; *Wright v. Simpson*, 6 Ves. 734; *Rees v. Berrington*, 2 L. C. 992; *Bailey v. Edwards*, 4 B. & S. 711; 12 W. R. 337; *Davies v. Stainbank*, 6 De G. M. & G. 679.

(*l*) *Hulme v. Coles*, 2 Sim. 12; *Prendergast v. Devey*, 6 Mad. 124; *Price v. Edmunds*, 10 B. & C. 578.

(*m*) *Webb v. Hewitt*, 3 K. & J. 442; *Boulbee v. Stubbs*, 18 Ves. 26; *Wyke v. Rogers*, 1 De G. M. & G. 408.

rights against the surety. But where the purported <sup>principal</sup> release is in general terms, the surety will be discharged, <sup>debtor.</sup>

and that not from any equity in his favour, but from considerations of bare justice to the principal debtor. For "it would be a fraud on the principal debtor to profess to release him and then to sue the surety, who in his turn would sue him; but where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor" (n).

So also, although it is a settled principle at law that a release or discharge of one surety by the creditor, even when founded on a mistake of law, operates as a discharge of the others (o); yet if the release can be construed as a *covenant not to sue*, it will not operate as a discharge of the co-sureties (p). And the same rule applies to a covenant not to sue the principal debtor. (3a.) If the creditor releases one co-surety. Secus, if creditor merely covenants not to sue the principal debtor or one co-surety.

But it is to be particularly observed, that although a creditor, upon giving time to the principal debtor, or on covenanting not to sue him, may reserve his right against the sureties, yet he cannot do so if he give to the debtor an *actual release*, as distinguished from a mere purported release or covenant not to sue, for the debt is in consequence of the release (being an actual release) gone at law. And where there was an agreement between a bond debtor and his creditor for the latter to take all the debtor's property, and to pay the other creditors five shillings in the pound, though it was not a discharge of the bond at law by way of accord and satisfaction, still it operated in equity as a satisfaction of the debt, and it was not possible in equity upon such a transaction to reserve any rights Creditor cannot reserve his rights against surety if he release the principal debtor or one co-surety.

(n) Per Mellish, L.J., in *Nevill's Case*, L. R. 6 Ch. 47.

(o) *Cheetham v. Ward*, 1 B. & P. 633; *Nicholson v. Revell*, 4 A. & E. 675; *Ex parte Jacobs, In re Jacobs*, L. R. 10 Ch. App. 211.

(p) *Price v. Barker*, 4 Ell. & Bl. 777; *Bailey v. Edwards*, 4 B. & S. 761; *Ex parte Good, In re Armitage*, L. R. 5 Ch. Div. 46.



against the surety; and any attempt to do so would be void, as being inconsistent with the agreement (*g*).

(4.) If creditor loses or allows securities to go back into debtor's hands.

A surety being entitled on payment of the debt to all the securities which the creditor has or has ever had against the principal, whether such securities were given at the time of the contract of suretyship, with or without the knowledge of the surety (*r*), or whether they were given after that contract, with or without the knowledge of the surety (*s*), it follows that, if a creditor who has had, or ought to have had, such securities, loses them, or suffers them to get back into the possession of the debtor, or does not make them effectual by giving proper notice (*t*), the surety, to the extent of such security, will be discharged (*u*). So where a creditor, by neglecting the statutory formalities, lost the benefit of an execution under a warrant of attorney, which, according to the agreement of suretyship, he had proceeded to enforce, upon a notice by the surety, it was held that the surety was thereby discharged (*v*).

Marshalling of securities,—as against sureties.

All the general rules regarding the marshalling of securities which are stated and illustrated in the chapter on Marshalling Assets, *supra*, are applicable as against sureties also (*w*). The order of working out the successive redemptions and foreclosures of mortgaged estates, stated in the chapter on Mortgages,

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(*g*) *Webb v. Hewitt*, 3 K. & J. 438; *Nicholson v. Revell*, 4 Ad. & Ell. 675; *Kearsley v. Cole*, 16 Mees. & W. 128.

(*r*) *Mayhew v. Crickett*, 2 Swanst. 185.

(*s*) *Pearl v. Deacon*, 24 Beav. 186; 1 De G. & Jo. 461; *Lake v. Brutton*, 18 Beav. 34; 8 De G. M. & G. 440; *Pledge v. Buss*, Johnson, 663, 668; *Steel v. Dixon*, 17 Ch. Div. 825.

(*t*) *Strange v. Fooks*, 4 Giff. 408.

(*u*) *Capel v. Butler*, 2 S. & S. 457; *Law v. E. I. Co.*, 4 Ves. 824.

(*v*) *Watson v. Alcock*, 1 Sm. & Giff. 319; 4 De G. M. & G. 242; *Mayhew v. Crickett*, 2 Swanst. 185, 190. And see *Rainbow v. Juggins*, 5 Q. B. D. 138, and on app. 5 Q. B. D. 422.

(*w*) P. 280; *Kinnaird v. Webster*, 10 Ch. Div. 139.

*supra* (x), is applicable also to sureties (y), and is subject, as against sureties also, to the doctrine of consolidation, stated and illustrated in the same chapter, but now greatly cut down, as there also stated, by the Conveyancing and Law of Property Act, 1881.

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(x) P. 294; *Bevor v. Luck*, L. R. 4 Eq. 537. And see Minutes (*in extenso*) of the Decree in *Pemberton on Judgments and Orders*, 2d edit. pp. 478-480. See also *Bradley v. Riches*, 26 W. R. 910; 9 Ch. Div. 189.

(y) *Bowker v. Bull*, 1 Sm. N. S. 29; *Fairbrother v. Wodehouse*, 23 Beav. 18, 19; *Forbes v. Jackson*, 19 Ch. Div. 615, following *Newton v. Charlton*, 10 Ha. 646. And distinguish *Williams v. Owen*, 13 Sim. 597; *Dawson v. Bank of Whitehaven*, L. R. 6 Ch. Div. 218, reversing S. C. as reported in L. R. 4 Ch. Div. 639.

## CHAPTER VI.

## PARTNERSHIP.

**Partnership.** COURTS of equity exercise a full concurrent jurisdiction with courts of law in all matters of partnership; indeed it may be said that the jurisdiction of courts of equity is, practically speaking, an exclusive jurisdiction in all cases of any complexity or difficulty. For wherever, as is almost invariably the case, an account, or a contribution, or an injunction, or a dissolution is sought in cases of partnership, or where a due enforcement of partnership rights, duties, and credits is required, the remedial justice administered by courts of equity was far more complete, extensive, and various, adapting itself to the particular nature of the grievance, and granting relief in the most beneficial and effectual manner, where no redress whatsoever, or very imperfect redress, could be obtained at law. And the Judicature Act, 1873 (s. 34), has recognised this superiority by assigning to the Chancery division of the court all matters of partnership involving either accounts or a dissolution.

**Specific performance of partnership agreement—when and when not decreed.**

A court of equity will in a proper case decree the specific performance of a contract to enter into partnership for a fixed and definite period of time (*a*); but it will not do so when no term has been fixed, for such a decree would be useless when either of the parties might dissolve the partnership immediately afterwards

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(*a*) *Buzton v. Lister*, 3 Atk. 385; *England v. Curling*, 8 Beav. 129.

(b). And it will not decree specific performance, even where a definite term has been fixed, unless there have been acts of part performance (c).

In like manner, after the commencement and during the continuance of the partnership, courts of equity will in many cases interpose to decree a specific performance of other agreements in the articles of partnership. If, for instance, there be an agreement to insert the name of a partner in the name of the firm, so as to clothe him publicly with all the rights of acting for the partnership, and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name, courts of equity will grant specific relief by an injunction against the use of any other firm name, not including his name. But the remedy in such cases is strictly confined to cases of studied delay and omission, and relief will not be given for a temporary, accidental, or trifling omission (d). So where there is an agreement by the partners not to engage in any other business, courts of equity will act by injunction to enforce it; and if profits have been made by any partner in violation of such an agreement in any other business, the profits will be decreed to belong to the partnership (e). A court of equity will further interfere by injunction to prevent such acts, on the part of any of the partners, as either tend to the destruction of the partnership property (f), or to impose an improper liability on the others, or to the exclusion of the other partners from the exercise of their partnership rights,

Injunction,—  
when and  
when not  
granted.

(1.) Against  
omission of  
name of  
one of the  
partners.

(2.) Against  
carrying on  
another  
business.

(3.) Against  
destruction  
of partner-  
ship property.

(4.) Against  
exclusion of  
partner.

(b) *Hercey v. Birch*, 9 Ves. 357; *Mr. Swanston's Note to Crawshaw v. Maule*, 1 Swanst. 511-513.

(c) *Scott v. Rayment*, L. R. 7 Eq. 112.

(d) *Marshall v. Colman*, 2 J. & W. 266, 269.

(e) *Somerville v. Mackay*, 16 Ves. 382, 387, 389; *England v. Curling*, 8 Beav. 129.

(f) *Miles v. Thomas*, 9 Sim. 606, 609; *Marshall v. Watson*, 25 Beav. 501.

whether those rights be founded on the law relating to partnerships in general, or on agreement (*g*), and although no dissolution is prayed (*h*).

Courts of equity will not enforce specific performance of articles where remedy at law is entirely adequate.

Nor of an agreement to refer to arbitration, unless under Common Law Procedure Act, 1854.

But courts of equity will not in all cases interfere to enforce a specific performance of the agreement of partnership, or to issue an injunction against the breach of any particular article therein. Where the remedy at law is entirely adequate, no relief will be granted in equity; also where the partnership agreement contains a clause referring disputes to arbitration, courts of equity, since the passing of the Common Law Procedure Act, 1854, have shown an inclination to enforce such agreements for reference, remitting the parties to the arbitration as their self-chosen exclusive forum (*i*), provided of course the question in difference is not paramount the agreement for reference (*j*).

Partnership—constitution of.

A partnership may be constituted in various ways by agreement, whether express or implied, and there is scarcely any variety of term which may not be included in the agreement. Also, it appears that persons become partners, at least *inter se*, if they agree to go shares in the profits and losses of the business (*k*), although merely sharing in the profits, without being at the same time liable also for the losses (*l*), and without being invested with a capacity of agent for self and copartners (*m*) would not constitute a man a partner. In the absence of any stipulation to the contrary, the shares of the partners in the capital

(*g*) *Deitrichsen v. Cabburn*, 2 Ph. 59.

(*h*) *Hall v. Hall*, 12 Beav. 414.

(*i*) *Seligmann v. De Boutillier*, L. R. 1 C. P. 681; *Willesford v. Watson*, L. R. 14 Eq. 572; 20 W. R. 32; dissenting from *Street v. Rigby*, 6 Ves. 815, and *British Emp. Shipping Co. v. Some*, 3 K. & J. 433; and see *Hodgson v. Railway Passenger Co.*, 9 Q. B. D. 188.

(*j*) *Mulkern v. Lord*, 4 App. Ca. 182.

(*k*) *Pawsey v. Armstrong*, 18 Ch. Div. 698.

(*l*) *Bovill's Act*, 28 & 29 Vict., c. 86.

(*m*) *Cox v. Hickman*, 8 Ho. Lo. 268.

and in the profits and losses are equal; also, when a partnership has run out its agreed term, and nevertheless continues after the term, it is a partnership upon all the old terms which are applicable to a partnership at will (*n*).

A partnership may be dissolved in various ways,—

1. By operation of law. Of events on which by operation of law the partnership is determined, the principal ones seem to be the death of one of the partners, unless there be an express stipulation to the contrary (*o*); the bankruptcy of all or one of the partners (*p*); the conviction of any one of them for felony (*q*); or a general assignment by one or more of the partners, whether the partnership be determinable at will, or, it seems, even where it is for a definite period (*r*). To these may, perhaps, be added any event which makes either the partnership itself, or the objects for which it was formed illegal (*s*). In these cases the partnership determines by operation of law from the happening of the particular event, without any option of any of the parties.

Dissolution of partnership,—  
modes of.  
1. By operation of law.

2. By agreement of parties. By mutual agreement of *all* the partners, the partnership, though for an unexpired term, may be put an end to (*t*).

2. By agreement of parties.

Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases; and the partnership will then be

Partnership at will may be dissolved at any moment.

(*n*) *Yates v. Finn*, 13 Ch. Div. 839; *Cox v. Willoughby*, 13 Ch. Div. 863; *Parsons v. Hayward*, 31 Beav. 199.

(*o*) *Gillespie v. Hamilton*, 3 Mad. 251; *Crawshay v. Maule*, 1 Swanst. 495; and see *Backhouse v. Charlton*, 8 Ch. Div. 444.

(*p*) *Barker v. Goodair*, 11 Ves. 83, 86; *Crawshay v. Collins*, 15 Ves. 228.

(*q*) 2 Bl. Com. 409; Co. Litt. 391 a.

(*r*) *Heath v. Sansom*, 4 B. & Ad. 172; *Nerot v. Burnard*, 4 Russ. 247.

(*s*) *Eposito v. Bowden*, 7 E. & B. 763, 785; *Dixon on Partnership*, 431, 432.

(*t*) *Hall v. Hal* 12 Beav. 414.

deemed to continue only so far as may be necessary for the purposes of winding up its then pending affairs (*u*). But at the same time, the Court of Chancery would restrain an immediate dissolution and sale of the partnership property, if it appeared that irreparable mischief would ensue from such a proceeding (*v*).

Dissolution by  
event provided  
for.

A partnership may also expire by the efflux of the time fixed upon by the partners for the limit of its duration (*w*).

3. By decree  
of court.

3. Dissolution by decree of a court of equity. A court of equity will in many cases decree a dissolution at the instance of a partner, in cases where he cannot by his own act dissolve the partnership. The following are the principal cases in which, and grounds upon which, the court has decreed a dissolution:—

Partnership  
induced by  
fraud.

(*a*.) A partnership may be dissolved as from its commencement where it has originated in fraud, misrepresentation, or oppression (*x*).

Gross mis-  
conduct and  
breach of  
trust.

(*b*.) If one partner grossly misconducts himself in reference to partnership matters, acting in breach of the trust and confidence between the partners, this will be a ground for a dissolution (*y*).

Continual  
breaches of  
contract.

(*c*.) So, if there have been continual breaches of the partnership contract by one of the parties, as if he has persisted in carrying on the business in a manner totally different from that agreed on, the court will dissolve the partnership (*z*). But there must be a

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(*u*) *Peacock v. Peacock*, 16 Ves. 50.

(*v*) Lindley on Partnerships, 232; *Blisset v. Daniel*, 10 Hare, 493; see Pothier on Partn. s. 150; also *Levy v. Walker*, 10 Ch. Div. 436.

(*w*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298-307.

(*x*) *Rawlins v. Wickham*, 1 Giff. 355; 7 W. R. 145; *Hue v. Richards*, 2 Beav. 305.

(*y*) *Smith v. Jeyes*, 4 Beav. 503; *Harrison v. Tennant*, 21 Beav. 482.

(*z*) *Waters v. Taylor*, 2 V. & B. 299.

substantial failure in the performance of the agreement on the part of the defendant; it is not the office of a court of equity to enter into a consideration of mere partnership squabbles (a).

(d.) If a partner who ought to attend to the business wilfully and permanently absents himself from it, or becomes so engrossed in his private affairs as to be unable to attend to it, this would seem, independently of agreement, to be a ground for dissolution (b).

(e.) And although the court will not dissolve a partnership merely on account of the disagreement or incompatibility of temper of the partners, where there has been no breach of the contract (c); yet, if the disagreements are so great as to render it impossible to carry on the business, all mutual confidence being destroyed, there cannot be a doubt that the court will dissolve the partnership (d); and in this case, the dissolution will in general take effect from the date of the judgment, and not (as in the general case) from the date of issuing the writ (e).

(f.) Whenever a partner who is to contribute his skill and industry in carrying on the business, or who has a right to a voice in the partnership, becomes permanently insane, a court of equity will dissolve the partnership (f). Insanity of a partner is not, however, in the absence of agreement, *ipso facto* a dissolution,

(a) *Wray v. Hutchinson*, 2 My. & K. 235; *Anderson v. Anderson*, 25 Beav. 190.

(b) *Harrison v. Tennant*, 21 Beav. 482; *Smith v. Mules*, 9 Hare, 556.

(c) *Goodman v. Whitcomb*, 1 J. & W. 589, 592; *Jauncey v. Knowles*, 29 L. J. Ch. 95.

(d) *Baxter v. West*, 1 Dr. & Sm. 173; *Watney v. Wells*, 30 Beav. 56; *Leary v. Shout*, 33 Beav. 582.

(e) *Lyon v. Tweddell*, 17 Ch. Div. 529.

(f) *Waters v. Taylor*, 2 V. & B. 303; *Patey v. Patey*, 5 L. J. Ch. N. S. 198; *Anon.* 2 K. & J. 441; *Rowlands v. Evans*, 30 Beav. 302.



but it is only a ground (the case being otherwise proper) for dissolution by decree of the court (*g*).

Share in partnership a right to money.

The share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities of the firm have been paid and discharged: and it is this only which on the death of a partner passes to his representatives (*h*).

Account on dissolution. Receiver appointed only in case of dissolution.

Where a dissolution has taken place, not only will an account be decreed, but, if necessary, a manager or receiver will be appointed to close the partnership business, and make sale of the partnership property, so that a final distribution may be made of the partnership effects; but a manager or receiver will not be appointed except with a view to a dissolution (*i*).

Account where no dissolution is prayed.

As to decreeing an account where no dissolution is intended or prayed, the general rule is, that where a partner has been excluded, or the conduct of the other party has been such as would entitle the complaining partner to a dissolution as against him, a general account, at any rate up to the time of filing the bill, will be decreed; but that in no case will a continuous account be decreed, as that would be, in part at least, a carrying on of the business by the Court of Chancery (*j*).

Partner making advantage out of the partnership property, accountable to other partners.

A partnership, though in a certain sense expiring on any of the events that have been mentioned—such as death, effluxion of time, or bankruptcy of a partner

(*g*) *Jones v. Noy*, 2 My. & K. 125.

(*h*) *Lindley on Partnership*, 681; *Knox v. Gye*, L. R. 5 H. L. 656; *Noyes v. Crawley*, 10 Ch. Div. 31.

(*i*) St. 672; *Hall v. Hall*, 3 Mac. & G. 79; *Baxter v. West*, 28 L. J. Ch. 169.

(*j*) *Dixon on Partnership*, 193; St. 671; *Loscombe v. Russell*, 4 Sim. 8; *Fairthorne v. Weston*, 3 Hare, 387.

—does not expire to all purposes; for all the partners are interested in the business until all the affairs of the partnership have been finally settled by all (*k*). Hence the partners thus continuing a business are accountable to the rest, not merely for the ordinary profits, but for all the advantages which they have obtained in the course of the business (*l*).

But there is no fiduciary relation between the surviving partners and the representatives of the deceased partner; therefore, although they may respectively sue each other in equity, their rights are legal rights for an account, and will be barred by the Statute of Limitations (*m*). The representatives, moreover, have no lien on any specific part of the partnership estate, which in the first instance accrues in its entirety to the surviving partners, both at law and in equity.

Representatives of deceased partner entitled to an account, but have no lien.

From the principle that the share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money, and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties (*n*).

In equity, land forming an asset of the partnership is money;

And personal representative takes.

Not only are lands purchased out of partnership funds for partnership purposes treated in equity as personalty (*o*), but the rule is the same in certain cases

Immaterial whether land has been purchased or devised, so long as "involved in the business."

(*k*) *Crawshaw v. Collins*, 2 Russ. 344.

(*l*) *Clements v. Hall*, 2 De G. & J. 173; *Willett v. Blanford*, 1 Har. 253; *Wedderburn v. Wedderburn*, 22 Beav. 84; 2 Sp. 208. And distinguish *Dean v. M'Dowell*, 8 Ch. Div. 345.

(*m*) *Knox v. Gye*, L. R. 5 H. L. 656.

(*n*) *Lindley on Partnership*, 687; *Darby v. Darby*, 3 Drew. 495; *Steward v. Blakeway*, L. R. 4 Ch. 603; *Wylie v. Wylie*, 4 Gr. 278.

(*o*) *Phillips v. Phillips*, 1 M. & K. 649.

where lands have been acquired by devise, the question in every case being, as was said by James, L.J., in *Waterer v. Waterer* (p), whether or not the lands are "*substantially involved in the business*."

Creditors may on decease of one partner, go against survivors, or against the estate of deceased.

In cases of partnership debts, on the decease of one partner, the creditors may, at their option, pursue their legal remedies against the survivors or survivor, or resort in equity to the estate of the deceased, and this altogether without regard to the state of the accounts between the partners themselves, or to the ability of the survivors or survivor to pay (q).

Separate creditors paid out of separate estate before partnership creditors.

The liability of partners, although sometimes called joint and several, differs in important particulars from a joint and several liability. Thus, although the separate estate of the deceased is liable, yet it is liable only as for a joint debt; consequently the separate creditors of the deceased are entitled to be paid their debts in full, before the creditors of the partnership can claim anything from his separate estate (r). Hence, a creditor of the partnership, who is also a debtor to the deceased, cannot, in an administration of the deceased's estate, set off his separate debt against the joint debt due to him (s). But a joint debt contracted in fraud of any of the partners may, at the option of the creditor, be treated as a joint or as a separate debt (t).

Partnership creditors paid their debts out of partnership funds before separate creditors.

On the other hand, the creditors of the partnership have a right to the payment of their debts out of the partnership funds before the private creditors of the partners. But this preference was, at law, generally

(p) L. R. 15 Eq. 402; Lindley on Partnership, 687.

(q) *Baring v. Noble*, 2 R. & M. 495.

(r) *Gray v. Chiswell*, 9 Ves. 118; *Ridgway v. Clare*, 19 Beav. 111; *Ex parte Wilson*, 3 M. D. & De G. 57.

(s) *Stephenson v. Chiswell*, 3 Ves. 566.

(t) *Ex parte Adamson*, in *re Collie*, 8 Ch. Div. 807.

disregarded; in equity it was worked out through the equity of the partners over the whole fund (*u*); and now there is no distinction between law and equity in this respect, except that the jurisdiction is assigned exclusively to the Chancery division of the court. The rule is the same even although the partnership is ostensible only (*v*).

Another illustration of the beneficial result of equity jurisdiction in cases of partnership may be found in the case of two firms dealing with each other, where some or all of the partners in one firm are partners with other persons in the other firm. Upon the technical principles of the common law in such cases no suit could be maintained at law in regard to any transactions or debts between the two firms (*w*). But there was no difficulty in proceeding in courts of equity to a final adjustment of all the concerns of both firms, in regard to each other; for, in equity, it was sufficient that all parties in interest were before the court as plaintiffs or as defendants, and they need not, as at law, in such a case, have been on opposite sides of the record. In equity, all contracts and dealings between such firms, of a moral and legal nature, were deemed obligatory, though void at law. Courts of equity, in such cases, looked behind the form of the transactions to their substance, and treated the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were, in fact, corporate companies (*x*). And the rules of equity now prevail in these respects in all divisions of the court.

Two firms having a common partner could not sue one another at law, but might do so in equity.

(*u*) *Twiss v. Massey*, 1 Atk. 67; *Campbell v. Mullett*, 2 Swanst. 574. And see *Lacey v. Hill*, L. R. 4 Ch. Div. 537, affirmed successively in the Court of Appeal and in the House of Lords.

(*v*) *In re Puleford*, 8 Ch. Div. 11; *Ex parte Sheen*, 6 Ch. Div. 235; and see *Ex parte Blythe*, in *re Blythe*, 16 Ch. Div. 620.

(*w*) *Bosanquet v. Wray*, 6 Taunt. 597.

(*x*) *Mainwaring v. Newman*, 2 B. & P. 120; St. 679, 680; *De Tastet v. Shaw*, 1 B. & A. 664.

At law, one partner cannot sue his co-partners in a partnership transaction—he may in equity.

Upon similar grounds, one partner could not, at law, maintain a suit against his co-partners to recover the amount of money which he had paid for the partnership, since he could not sue them without suing himself also, as one of the partnership (*y*), but he might have done so in equity; and now the rule of equity prevails.

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(*y*) *Wright v. Hunter*, 5 Ves. 792; *Bovill v. Hammond*, 6 B. & C. 151; *Sedgwick v. Daniell*, 2 H. & N. 319; *Atwood v. Maude*, L. R. 3 Ch. 369. And see Brown's Law Dictionary, title *Partnership*.

## CHAPTER VII.

## ACCOUNT.

I. THE action of account was one of the most ancient forms of action at the common law. But the modes of proceeding in that action, although aided from time to time by statute, were found so very dilatory, inconvenient, and unsatisfactory, that as soon as courts of equity began (and they began very early) to assume jurisdiction in matters of account, the remedy at law began to decline, and fell into disuse.

I. Account.

At common law, dilatory and inconvenient.

At the common law an action of account lay in two classes of cases:—

When account lay at law.

1. Where there was either a privity in deed by the consent of the party, as against a bailiff, a receiver appointed by the party; or a privity in law, *ex provisione legis*, as against guardians in socage (*a*), and their executors and administrators (*b*).

1. In cases of privity of deed or law.

2. By the law merchant, one naming himself a merchant might have an account against another, naming him as a merchant, and charge him as a receiver (*c*), or against his executors (*d*).

2. Between merchants.

And the reasons for the disuse of the action of account at common law, and its progress in equity, are not hard to find—one ground was, that courts of common law could not compel a discovery from the

Sutors preferred equity, because of its power of discovery and of administration.

(a) Co. Litt. 90 b.

(c) Co. Litt. 172 a.; 11 Co. R. 89.

(b) 3 &amp; 4 Anne, c. 16.

(d) 13 Edw. III. c. 23.

defendant on his oath ; another ground was, that the machinery and administrative powers of the courts of common law were not so well adapted for the purposes of an account as those of the courts of equity.

In what cases  
equity allows  
an account.

Courts of common law having failed to give due relief in cases of account, suitors were obliged, in most cases, to come into equity for that purpose. It now becomes necessary to examine in what cases equity will afford such relief. It should be premised, however, that since the coming into operation of the Judicature Acts, 1873-75, the jurisdiction in account has become co-extensive at law and in equity ; consequently, that in all matters of account whatsoever, equity now has jurisdiction, although the accounts should be ever so simple, and although law would therefore be the more proper forum ; and on the other hand, law also now has jurisdiction in all matters of account, even the most complicated, and even when a fiduciary relation is involved in the case. But in all these last-mentioned cases, the equity division is the properer and more convenient jurisdiction ; and we propose therefore to set forth the principal of such last-mentioned cases in which an action for an account more properly lies in the equity division.

1. Principal  
against agent,  
subject to the  
Statute of  
Limitations.

1. Equity will assume jurisdiction where there exists a fiduciary relation between the parties ; as in favour of a principal against his agent, though not in favour of the agent against the principal. The rule is thus stated by Sir J. Leach (e) :—"The defendants here were agents for the sale of the property of the plaintiff, and wherever such a relation exists a bill will lie for an account ; *the plaintiffs can only learn from the discovery of the defendants how they have acted in the execution of their agency.*" But an agent is not pre-

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(e) *Mackenzie v. Johnston*, 4 Mad. 373.

cluded from setting up the Statute of Limitations against his principal, unless a confidential relation in the nature of a trust has been created (*f*).

It has been argued that if the principal may commence an action against his agent, the agent may likewise do so against his principal; but the rights of principal and agent are not correlative. The rights of the principal rest upon the trust and confidence reposed in the agent, but the agent reposes no such confidence in the principal (*g*).

Agent cannot have an account against his principal.

By analogy to the case of principal against agent, the Court of Chancery decrees an account against the infringer of a patent, on the ground that the patentee may adopt the acts of the defendant as those of an agent. From this principle it follows, that the plaintiff in such a suit must elect between an account and damages. He cannot claim both, and at the same time approbate and reprobate the agency of the defendant (*h*). The same rules are applicable to the case of the assignee of a patent suing a licensee of the assigner (*i*).

(a.) Patentee against infringer.

Cases of account between trustees and *cestui que* trust may properly be deemed confidential agencies, and are peculiarly within the jurisdiction of courts of equity (*j*).

(b.) *Cestui que* trust against trustee.

2. It seems that equity will assume jurisdiction where there are mutual accounts between the plaintiff and the defendant.

2. Cases of mutual accounts between plaintiff and defendant.

(*f*) *In re Hindmarsh*, 1 Dr. & Sm. 129; *Burdick v. Garrick*, L. R. 5 Ch. 233.

(*g*) *Padwick v. Stanley*, 9 Hare, 627; *Smith v. Leveaux*, 33 L. J. Ch. 167.

(*h*) *Neilson v. Betts*, L. R. 5 H. L. 1; *Watson v. Holliday*, 20 Ch. Div. 780.

(*i*) *Bergmann v. M'Millan*, 17 Ch. Div. 423.

(*j*) *Docker v. Simes*, 2 My. & Keen, 664.



"Mutual accounts"—where each of two parties has received and also paid on the other's account.

As to what are mutual accounts, the best definition is to be found in the judgment in *Phillips v. Phillips* (k). "I understand a mutual account to mean not merely where one of the two parties has received money and paid it on account of the other, but *where each of two parties has received and also paid on the other's account*. I take the reason of that distinction to be, that in the case of proceedings at law, where each of the two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments—a position of the case which, to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other, it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments. The question is only of receipts on the one side and payments on the other, and it is a mere question of set-off; but it is otherwise where *each party* has received and paid" (l).

No account if it is a mere question of set-off.

3. Circumstances of great complication.

3. An action for an account will also lie where there are circumstances of great complication. As to what is the criterion of the amount of complication necessary to give jurisdiction to a court of equity, independently of any other circumstances, the judgment of Lord Redesdale in *O'Connor v. Spaight* (m) is in point:—"The ground on which I think that this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all

The test is—Can the accounts be examined on a trial at *Nisi Prius*?

(k) 9 Hare, 471.

(l) *Padwick v. Hurst*, 18 Beav. 575; *Fluker v. Taylor*, 3 Drew. 183.

(m) 1 Sch. & Lefr. 305.

necessary accuracy. . . . This is a principle on which courts of equity constantly act, by taking cognisance of matters which, though cognisable at law, are yet so involved with a complex account that it cannot properly be taken at law." But this principle is not quite settled (*n*); and it is by no means to be taken as a universally conclusive criterion, especially as the Common Law judges have a special power conferred on them by the Procedure Act of 1854 (*o*), on a cause coming on at *nisi prius*, to compel a reference to arbitration; and now under the Judicature Acts, 1873-75, and rules thereunder, matters of account as well as other matters may be variously referred to an official or other referee for report (*p*). And the suggested rule, therefore, cannot perhaps be put higher than this—that the difficulty of examining the accounts at *nisi prius* will be a strong circumstance in favour of a resort to the aid of equity. In short, the equity to an account must be judged from the nature and facts of each particular case (*q*).

Compulsory reference to arbitration by 17 & 18 Vict., c. 125, s. 3; and references of various sorts for report under Judicature Acts, 1873-75, and rules.

It is ordinarily a good bar to a suit for an account that the parties have already in writing stated and adjusted the items of the account and struck the balance (*r*). In such a case a court of equity will not interfere, for, under such circumstances, an *indebitatus assumpsit* lies at law, and there is no ground for resorting to equity. If, therefore, there has been an account stated, that may be set up by way of plea as a bar to all discovery and relief, unless some matter is shown which calls for the interposition of a court of equity. But if there has been any mistake, or omission,

Chief defences to suit for an account.  
(1.) Stated or settled account.

(*n*) *Taff Vale Rail. Co. v. Nixon*, 1 H. L. Cas. 111; *South-Eastern Rail. Co. v. Martin*, 2 Phill. 758; 1 Hall. & Twells, 69; *Phillips v. Phillips*, 9 Hare, 475.

(*o*) 17 & 18 Vict., c. 125, s. 3.

(*p*) *Longman v. East*, *Pontifex v. Severn*, *Mellin v. Monico*, 26 W.R. 183.

(*q*) *Phillips v. Phillips*, 9 Hare, 475; *South-Eastern Rail. Co. v. Martin*, 2 Phill. 758; 1 Hall. & Twells, 69.

(*r*) *Dawson v. Dawson*, 1 Atk. 1.

(1.) Equity will "open" the whole account if there be mistake or fraud; and in other cases particular items only will be examined, i.e., liberty will be given to "surcharge" and "falsify."

or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will in some cases direct the whole account to be opened and taken *de novo*. In other cases, where the mistake, or omission, or inaccuracy, or fraud, or imposition, is not shown to affect or stain all the items of the transaction, the court will content itself with allowing the account to stand, with liberty to the plaintiff to surcharge and falsify it—the effect of which is to leave the account in full force as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes. The showing an omission for which credit ought to be given is a surcharge; the proving an item to be wrongly inserted is a falsification. The *onus probandi* is always on the party having liberty to surcharge and falsify (s). And this liberty to surcharge and falsify includes an examination not only of errors of fact, but of errors of law. What shall constitute, in the sense of a court of equity, a stated or settled account, is in some measure dependent on the circumstances of each case. An acceptance of an account may be express, or it may be implied from circumstances. Acquiescence in stated accounts, even though for a long time, although it amounts to an admission or presumption of their correctness, does not of itself establish the fact of the account having been settled (t).

(2.) Laches and acquiescence.

The court is generally unwilling to open a settled account, especially after a long time has elapsed, except in cases of apparent fraud (u). But in cases of settled

(s) *Pitt v. Cholmondeley*, 2 Ves. Sr. 565.

(t) *Hunter v. Belcher*, 2 De G. J. & S. 194, 202; *Gething v. Keighley*, 9 Ch. Div. 547.

(u) *Banner v. Berridge*, 18 Ch. Div. 254.

accounts between trustee and *cestui que trust*, and other persons standing in confidential relations to one another, where *mala fides* is alleged, there is scarcely any length of time that will prevent the court from opening the account altogether (v), or at any rate giving liberty to surcharge and falsify.

And it should be remembered that a broker is in a fiduciary relation to his client (w), although a banker is not in any such relation towards his customer (x). Also, *semble*, an assurance society is not in any fiduciary relation towards the person entitled to the policy moneys, but is rather in the position of a mere stakeholder (y).

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(v) *Matthews v. Wallwyn*, 4 Ves. 125; *Todd v. Wilson*, 9 Beav. 486; *Watson v. Rodwell*, L. R. 7 Ch. Div. 625; 11 Ch. Div. 150; and see pp. 161-262, *supra*.

(w) *Ex parte Cook*, *In re Strachan*, L. R. 4 Ch. Div. 123.

(x) *Foley v. Hill*, 1 Phill. 405.

(y) *Matthew v. Northern Assurance Co.*, 9 Ch. Div. 80. But see *In re Haycock's Policy*, 1 Ch. Div. 611; *Crosley v. City of Glasgow Life Assurance Co.*, 4 Ch. Div. 421; *Webster v. British Empire Assurance Co.*, 15 Ch. Div. 169.

## CHAPTER VIII.

## SET-OFF AND APPROPRIATION OF PAYMENTS.

## I. Set-off.

At law, no set-off in case of mutual unconnected debts.

As to connected accounts, balance recoverable both at law and in equity.

Cases in which equity allowed, although law did not allow, set-off.

I. SET-OFF.—“Natural equity says that cross demands should compensate each other, by deducting the less sum from the greater, and that the difference is the only sum which can be justly due” (a). But the common law refused to carry out this principle of natural justice, where the mutual debts were unconnected, and the respective creditors were required to sue in independent actions. The Legislature accordingly in due course interfered, firstly in the case of bankrupts, and allowed a set-off at common law in that and a few other cases, by the statutes of “Set-off” (b). On the other hand, as regards connected accounts of debit and credit, both at law and in equity, and without any reference to the last-mentioned statutes, the balance of the accounts only was recoverable; which was therefore a virtual set-off between the parties (c).

Even equity generally followed the law as to set-off, but with limitations and restrictions. If there was no connection between the demands, then the rule was as at law; but if there was a connection between the demands, equity acted upon it, and allowed a set-off under particular circumstances (d).

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(a) *Green v. Farmer*, 4 Burr. 2220.

(b) 4 Anne, c. 17, s. 11; 2 Geo. II., c. 22, s. 13; 8 Geo. II., c. 24,

s. 4.

(c) *Dale v. Sollet*, 4 Burr. 2133.

(d) *Rawson v. Samuel*, 1 Cr. & Ph. 161, 172, 173.

In the first place, then, it would seem, independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, were accustomed to grant relief in all cases of mutual and independent debts (1.) In the case of mutual independent debts where there was mutual credit.

1. where there was a mutual credit; and by mutual credit, in the sense in which the term is here used, was to be understood a knowledge, on both sides, of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it (e). Thus, for example, if A. should be indebted to B. in the sum of £10,000 in a bond, and B. should borrow of A. £2000 on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties as to the £2000, as an ultimate set-off, *pro tanto*, against the debt of £10,000. Now, in such a case, a court of law could not set-off these independent debts against each other; but a court of equity would not hesitate to do so, upon the ground either of the presumed intention of the parties, or of what was called a natural equity (f). And now, under the Judicature Acts, 1873-75, and orders and rules thereunder, especially Order xix., Rule 3, in extension of the C. L. P. Act, 1854 (g), such independent debts contracted upon such a ground of mutual credit may be set-off against each other.

2. In the next place, as to equitable debts, or a legal debt on one side, and an equitable debt on the other, there was great reason to believe that whenever there was a mutual credit between the parties touching such debts, a set-off was upon that ground alone maintainable in equity; although the mere existence of mutual (2.) In the case of mutual equitable debts, or a legal debt on one side, and an equitable debt on the other, where there was mutual credit as to such debts.

(e) *Ex parte Prescott*, 1 Atk. 230.

(f) *Lanesborough v. Jones*, 1 P. Wms. 326; *Jeffs v. Wood*, 2 P. Wms. 128; *Roxburghe v. Cox*, 17 Ch. Div. 520.

(g) *Bullen and Leake*, p. 570.

debts, without such mutual credit, might not, even in a case of insolvency, have sustained it (h). But the mere existence of cross demands would not have been sufficient to justify a set-off in equity (i). Indeed, a set-off was ordinarily allowed in equity only when the party seeking the benefit of it could show some equitable ground for being protected against his adversary's demand—the mere existence of cross demands was not sufficient. *A fortiori* a court of equity would not interfere on the ground of an equitable set-off to prevent a party recovering a sum awarded to him for damages for breach of contract, merely because there was an unsettled account between him and the other party, in respect of dealings arising out of the same contract (j). But now there would be a set-off both at law and in equity in all these cases.

In cross demands, which, if recoverable at law, would be a subject of set-off, equity relieves.

However, where there were cross demands between the parties of such a nature that, if both were recoverable at law, they would be the subject of a set-off, then if either of the demands was a matter of equitable jurisdiction, the set-off would be enforced in equity (k). As, for example, if a legal debt was due to the defendant by the plaintiff, and the plaintiff was the assignee of a legal debt due to a third person from the plaintiff, which had been duly assigned to himself, a court of equity would set-off the one against the other, if both debts could properly be the subject of set-off at law (l). And now there would be no difficulty in setting off such cross demands either at law or in equity.

But a set-off always was, and still will be, prevented

(h) *James v. Kynnier*, 5 Ves. 110; *Piggott v. Williams*, 6 Mad. 95.

(i) *Rawson v. Samuel*, 1 Cr. & Ph. 161.

(j) St. 1436; *Rawson v. Samuel*, 1 Cr. & Ph. 161; *Best v. Hill*, L. R. 8 C. P. 10.

(k) *Clarke v. Cort*, 1 Cr. & Ph. 154.

(l) St. 1436 a; *Williams v. Davies*, 2 Sim. 461.

by some intervening equity. Thus, a shareholder in a limited company, who is also a creditor, will not, in the event of the company being wound up, be allowed to set-off his debt against calls made on him; but must first pay the amount of all calls due, and then take a dividend rateably with the other creditors. In this case the equity of the general creditors intervenes to prevent the set-off; otherwise, in the event of a deficiency of assets, the creditor-shareholder would get an undue preference, and in effect receive twenty shillings in the pound on the amount of his debt (*m*). The same rules are applicable to directors being creditors of the company (*n*). And there is no set-off of non-actionable claims against an actionable debt (*o*), or of an ordinary executable debt against one that is exempt from recovery by execution (*p*). But a solicitor's lien on costs appears to be no longer a bar to a set-off of costs against debt (*q*).

In winding up,  
debt not set-off  
against calls.

Other cases of  
no set-off.

In bankruptcy, where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under the bankruptcy, . . . the sum due from one party shall be set-off against any sum due from the other party; and this rule extends to a case of liquidated damages (*r*). And it extends also to unliquidated damages arising in connection with a contract (*s*).

Set-off under  
Bankruptcy  
Act, 1869,  
32 & 33 Vict.,  
o. 71, s. 29.

(*m*) *Grissell's Case*, L. R. 1 Ch. 528; *Black & Co.'s Case*, L. R. 8 P. Ch. 254; *Ince Hall Co. v. Douglas Forge Co.*, 8 Q. B. D. 179; but see *Brighton Arcade Company v. Dowling*, L. R. 3 C. P. 175; and especially *Elliott v. Turquand*, 7 App. Ca. 79.

(*n*) *In re Exchange Banking Co.*, W. N., 1882, p. 127.

(*o*) *Rawley v. Rawley*, 1 Q. B. Div. 460; and see *Hodgson v. Fox*, 9 Ch. Div. 673.

(*p*) *Gathercole v. Smith*, 17 Ch. Div. 1.

(*q*) *Pringle v. Gloag*, 10 Ch. Div. 676. And see the chapter on Liens, *supra*.

(*r*) *Booth v. Hutchinson*, L. R. 15 Eq. 30; and see Judicature Act, 1873, s. 25, § 1.

(*s*) Bankruptcy Act, 1869, s. 31; Judicature Acts, Order xix., 2, 3; and see *Jack v. Kipping*, 9 Q. B. D. 113.



No set-off of  
debts accruing  
in different  
rights.

In the next place, courts of equity, following the law, would not allow a set-off of a joint debt against a separate debt, or conversely of a separate debt against a joint debt, or, to state the proposition more generally, they would not allow a set-off of debts accruing in different rights; and, therefore, where an executor and trustee of a legacy, who was also the residuary legatee, had become the creditor of the husband and administrator of the deceased legatee, he was not, in the absence of any special agreement, allowed to set-off his debt against the legacy, to which the husband, having survived his wife the legatee, was as such administrator entitled (*t*).

Except under  
special cir-  
cumstances,  
as fraud.

But special circumstances might occur creating an equity which would justify the interposition of the court, even where the cross demands existed in different rights. Thus, in *Ex parte Stephens* (*u*), bankers were directed to lay out money in certain annuities, in the name and to the use of S. They did not do so; but, representing that they had done so, made entries and accounted for the dividends accordingly. S. afterwards, relying on their representations, gave a joint and several promissory-note with her brother to the bank, to secure the brother's private debt to them. The bankers afterwards failed, and their assignees in bankruptcy sued the brother alone. A petition was then presented by S. and her brother, praying that the petitioners might be at liberty to set-off what was due on the note against the debt due by the bankrupts to S., that she might prove for the residue, that the note might be delivered up, and the assignees might be restrained from suing upon it; and it was accordingly so decreed (*v*). And now, under the Judicature Acts, 1873-75, especially Order xvii., Rules 1, 3, and 4, what was formerly

(*t*) *Freeman v. Lamas*, 9 Hare, 109; *Lambard v. Older*, 17 Beav. 542; *Bailey v. Finch*, L. R. 7 Q. B. 34. (*u*) 11 Ves. 24.

(*v*) *Vulliamy v. Noble*, 3 Mer. 593; *Ex parte Hanson*, 12 Ves. 346; 18 Ves. 232; *Cawdor v. Lewis*, 1 You. & Coll. Exch. C. 427, 433.

- X permitted in exceptional cases only is now apparently made the rule, so that debts accrued in different rights may be now set-off, *semble*.

II. *Appropriation of payments*.—Questions as to the appropriation, or, as it is termed in the Roman law, the imputation of payments, arise in this way. Suppose a person owing another several debts makes a payment to him, the question then arises, to which of these debts shall such payment be appropriated or imputed?—a matter often of considerable importance, not only to the debtor and creditor, but sometimes also to third persons. For instance, suppose A. owes to B. two distinct sums of £100 and £100, and A. could set up the Statute of Limitations as a defence to an action for the earlier of the two debts, but not to an action brought for the other, it is clear that if A. paid £100 to B., and that payment could be imputed to the earlier debt, B. could still recover from him another £100; whereas if it were appropriated to the later debt, he would be without remedy as to the earlier. Again, suppose A. owes B. two sums of £500, for the first of which C. is a surety; if A. pays B. £500, and it is imputed to the first £500, C.'s liability will cease; if it be imputed to the other £500, C.'s liability will remain (*w*).

The first rule upon the subject of appropriation is,—that the debtor has the first right to appropriate any payments which he makes to whatever debt, due to his creditor, he may choose to apply it, provided the debtor exercise this option *at the time of making the payment* (*x*). And the intention of the person making the payment may not only be manifested by him in

(1.) Debtor has first right to appropriate payments to which debt he chooses at time of payment.

(*w*) *Clayton's Case*, 1 Mer. 572; Tudor's L. C. Merc. Law, 17.  
(*x*) St. 459 c; *Anon.* Cro. Eliz. 68.

express terms (*y*), but it may be inferred from his conduct at the time of payment, or from the nature of the transaction (*z*).

(*z*). If debtor omit, the creditor has the next right of appropriation to what debts he chooses.

In the next place, where the debtor has himself made no special appropriation of any payment, then the creditor is at liberty to apply that payment to any one or more of the debts which the debtor owes him (*a*); and it seems that the creditor need not make an immediate appropriation of it, but may do so at any time, at least before action (*b*). This privilege of the creditor, however, must be taken with this limitation, that he has no right to apply a general payment to an item in the account which is in itself illegal and contrary to law (*c*).

However, where A. was indebted to B. on several accounts, and a payment had been made, as for the first instalment of a composition on the several debts; but the arrangement subsequently broke down, owing to the non-payment of the other instalments; it was held, that it was not open to either party subsequently to appropriate the payment to any specific debt; but that from the nature of the transaction it must be deemed to have been paid in respect of all the debts rateably (*d*).

Statute-barred debts, appropriation to, effect of.

Where there are two debts, one of them barred by the Statute of Limitations, and a payment is made by the debtor without appropriating the payment, the creditor may appropriate it towards satisfaction of the debt already barred; but such an appropriation will

(*y*). *Ex parte Imbert*, 1 De G. & Jo. 152.

(*z*) *Young v. English*, 7 Beav. 10; *Att.-Gen. of Jamaica v. Mander-son*, 6 Moo. P. C. C. 239, 255; *Buchanan v. Kerby*, 5 Gr. 332.

(*a*) *Lysaght v. Walker*, 5 Bligh, N.S. 1, 28; *Re Brown*, 2 Gr. 111, 590.

(*b*) *Philpott v. Jones*, 4 Nev. & Man. 16; 2 Ad. & Ell. 44; *Simson v. Ingham*, 2 B. & C. 65.

(*c*) *Wright v. Laing*, 3 B. & C. 165; *Ribbans v. Crickett*, 1 B. & P. 264.

(*d*) *Thompson v. Hudson*, L. R. 6 Ch. 320.

- ✕ have no operation to revive a debt already barred (e). And where there are several debts, some of which are barred, if a payment is made on account of principal or interest generally, the effect of such payment will be to take out of the operation of the statute any debt which is not barred at the time of payment, but it will not revive a debt which is then barred; and the inference will be that the payment is to be attributed to those not barred (f).
- (a.) Appropriation will not revive a debt already barred.  
(b.) A general payment by debtor takes a debt not already barred out of the statute, but does not revive a barred debt.

If neither debtor nor creditor has made any appropriation, then the law will appropriate the payment, it seems, to the earlier, and not, as the Roman law does, to the more burdensome debt (g).

(3) If neither debtor nor creditor makes the appropriation, the law makes it.

This rule receives its most frequent application in cases of running accounts between parties, where there are various items of debts on one side, and various items of credit on the other side, occurring at different times, as in a banking account. In *Clayton's Case* (h), on the death of D., a partner in a banking firm, there was a balance of £1713 in favour of C., who had a running account with the firm. After the death of D., the surviving partners became bankrupt; but, before their bankruptcy, C. had drawn out sums to a larger amount than £1713, and had paid in sums still more considerable. It was held that the sums drawn out by C. after the death of D. must be appropriated to the payment of the balance of £1713 then due, and that consequently the estate of D. was discharged from the debt due from the firm at his death, the sums subsequently paid in by C. constituting a new debt, for which the surviving members of the firm were alone liable. In such a case, the sums paid to the creditor are deemed to be paid upon the general

*Clayton's Case*,— Current accounts, law of appropriation in cases of.

(e) *Mills v. Fowkes*, 5 Bing. N. C. 455.

(f) *Nash v. Hodgson*, 6 De G. M. & G. 474.

(g) *Mills v. Fowkes*, 5 Bing. N. C. 455. See Pothier on Oblig. by Evans, 528-535, 561-572.

(h) 1 Mer. 585.

blended account, and go to extinguish *pro tanto* the balance of the old firm, in the order of the earliest items thereof. "In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. *Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side.* The appropriation is made by the very act of setting the two items against each other. *Upon that principle all accounts current are settled, and particularly cash accounts.* When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head, instead of at the foot of it. A man's banker breaks owing him on the whole account a balance of £1000. It would surprise one to hear the customer say, 'I have been fortunate enough to draw out all that I have paid in during the last four years; but there is £1000 which I paid in five years ago, that I hold myself never to have drawn out, and therefore, if I can find anybody who was answerable for the debts of the banking-house such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week'" (i).

The account is not to be taken backwards, and the balance struck at the head instead of the foot.

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(i) *Clayton's Case*, 1 Mer. 608, 609; *Palmer's Case*, 1 Mer. 623, 624; *Sleech's Case*, 1 Mer. 539; and see *Birt v. Burt*, 11 Ch. Div. 773 n.; *Pennell v. Deffell*, 4 D. M. & G. 372, remarked upon in *In re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. Div. 696. And see (for the law as to the appropriation of securities when there is a double bankruptcy) *Ex parte Waring*, 19 Ves. 345; *Ex parte Gomez*, *In re Yglesias*, L. R. 10 Ch. App. 639; and distinguish *Vaughan v. Halliday*, L. R. 9 Ch. App. 561; *Ex parte Kelly & Co.*, *In re Smith, Fleming, & Co.*, 11 Ch. Div. 306.

## CHAPTER IX.

## SPECIFIC PERFORMANCE.

By the common law every executory contract to sell or transfer a thing was treated as a merely personal contract, and if left unperformed by the party, no redress could be had excepting in damages. But courts of equity deemed such a course wholly inadequate for the purposes of justice, and they did not hesitate to interpose and require from the conscience of the party a strict performance of what he could not, without manifest fraud or wrong, refuse. But the ground of the interference of equity having been the inadequacy of the remedy at law, it followed as a general principle, that where damages would be a full compensation, equity would not interfere (a), and such appears to be still the law under the Judicature Acts.

Breach of contract at common law a question of damages.

In equity, contract must be exactly performed.

Inadequacy of remedy at law, ground of equity jurisdiction.

There were, however, certain cases where equity refused, and in which therefore the High Court would still refuse, to interfere to compel specific performance; that is to say, the following classes of cases:—

Cases in which equity will not decree specific performance of an agreement or contract:—

(1.) The court will not decree specific performance of an agreement to do an action immoral or contrary to the law. As expressed by Sir William Grant, "You cannot stir a step but through the illegal agreement, and it is impossible for the court to enforce it" (b).

(1.) An illegal or immoral contract.

(a) *Harnett v. Yeilding*, 2 Sch. & Lef. 553.

(b) *Thomson v. Thomson*, 7 Ves. 470; *Ewing v. Osbaldiston*, 2 My. & Cr. 53.

(2.) An agreement without consideration.

2. So again, the court will not enforce specific performance of an agreement without consideration, or that is merely voluntary. In *Jefferys v. Jefferys* (c), where a father, by voluntary settlement, conveyed certain freeholds, and *covenanted* to surrender certain copyholds, to trustees in trust for his daughters, and afterwards devised the same freehold and copyhold estates to his widow; and a suit was instituted by the daughters against the widow to have the trusts of the settlement carried out,—the Lord Chancellor said, “The title of the plaintiffs to the FREEHOLDS is complete, and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned; but with regard to the COPYHOLDS, I have no doubt that *the court will not execute a voluntary contract.*”

(3.) A contract which the court cannot enforce.  
(a.) Where personal skill is required.

3. The incapacity of the court to compel the complete execution of a contract limits also its jurisdiction to compel specific performance, *e.g.*, in cases of agreements to do acts involving personal skill, knowledge, or inclination. Thus, in *Lumley v. Wagner* (d), where a lady agreed in writing with a theatrical manager to sing at his theatre for a definite period, and by a clause subsequently agreed to by her, she engaged not to use her talents at any other theatre or concert-room without the written authorisation of the manager; and she engaged with the manager of a rival theatre within the defined period,—it was held, that though the court would restrain the lady from singing at any other theatre, it could not compel her to sing at the theatre of the plaintiff according to her agreement (e). And on the same principle, the court refuses specific performance of an agreement for the

(c) Cr. & Ph. 141.

(d) 5 De G. & Sm. 485; 1 De G. M. & G. 604.

(e) *Martin v. Nutkin*, 2 P. Wms. 266; *Dieckhsen v. Cabburn*, 2 Phil. 52.

sale of the good-will of a business unconnected with the business premises, by reason of the impossibility of the thing and the uncertainty of the subject-matter, and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it (f). Again, the court will not in general interfere in cases of contracts to build or repair. "There is no case of a specific performance decreed of an agreement to build a house, because if A. will not do it, B. may. A specific performance is only decreed where the party wants the thing *in specie*, and cannot have it any other way" (g). In the case of building contracts, moreover, the plaintiff has an adequate, perhaps a better, remedy in damages (h); and building contracts are for the most part too uncertain to enable the court to carry them out (i). It seems, however, that where such an agreement is clear and definite in its nature, the court might without much difficulty entertain a suit for its performance (j). So again, the court will not enforce a contract which is in its nature revocable, for its interference in such a case would be idle, inasmuch as what it had done might be instantly undone by either of the parties; e.g., the court generally refuses to enforce specifically an agreement to enter into partnership where the agreement does not specify the duration of the partnership (k).

(b.) Contract to transfer good-will of a business without the premises.

(c.) Contracts to build or repair not enforced, because they are generally too uncertain.

(d.) Revocable contract.

4. Where the specific performance of a contract will be decreed upon the application of one party, the court will maintain the like suit at the instance of the other party; for in all such cases, the court acts upon

(4.) Contract wanting in mutuality.

(f) *Baxter v. Conolly*, 1 J. & W. 576; *Darbey v. Whittaker*, 4 Drew. 134, 139, 140.

(g) *Errington v. Aynsley*, 2 Bro. C. C. 343.

(h) *South Wales Railway Co. v. Wythes*, 1 K. & J. 186; 5 De G. M. & G. 880.

(i) *Mosely v. Virgin*, 3 Ves. 184; *Baumann v. James*, L. R. 3 Ch. 508; *Lucas v. Comerford*, 1 Ves. 235.

(k) *Hercy v. Birch*, 9 Ves. 357; *Sturge v. Mid. Rail. Co.*, 6 W. R. 233.



Statute of  
Frauds no ex-  
ception to this  
rule, excepting  
in appearance.

the ground that the remedy, if it exists at all, ought to be mutual and reciprocal, as well for the vendor as for the purchaser (l). It follows, therefore, that an infant cannot sustain a bill for specific performance, for the court will not compel a specific performance as against him (m). An apparent but no real exception to this rule arises under the Statute of Frauds, for the plaintiff may obtain specific performance of a contract signed by the defendant although not signed by himself; *scil.* because the Statute of Frauds (n) only requires the agreement to be signed by the party to be charged, and the plaintiff, by commencing the action, has, it is said, made the remedy mutual (o).

Division of  
subject ac-  
cording as the  
property is  
realty or is  
personalty.

*Upon - Voluntary Contract*  
Having premised these general observations, it is proposed to treat the subject under two heads, with regard to—

- I. Contracts respecting chattels personal; and
- II. Contracts respecting land.

No essential  
difference be-  
tween realty  
and person-  
alty.  
Contracts as  
to realty  
enforced, be-  
cause remedy  
at law is in-  
adequate.

In making this distinction, however, it is necessary to remember that the court decrees the specific performance of contracts, not upon any mere distinction between realty and personalty, but simply because damages at law will not in the particular case afford a complete remedy. Thus in the case of a contract for land, if (as is usually the case) the damages at law, which must be calculated upon the general money value of the land, will not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value; and if, in the case of a contract for the sale of stock or goods (as occasionally happens), the damages at law, calculated upon the market price of

*Secus*, con-  
tracts concern-  
ing person-  
alty, because  
the legal  
remedy as a  
rule is ade-  
quate.

(l) *Adderley v. Dixon*, 1 S. & S. 607.

(m) *Flight v. Bolland*, 4 Russ. 301.

(n) 29 Car. II., c. 3.

(o) *Flight v. Bolland*, 4 Russ. 301.

the stock or goods, will not be as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, in either of these cases, and on the ground simply of the inadequacy of the damages, the court will decree specific performance, but otherwise it will not do so (*p*).

### I. Contracts respecting personal chattels.

I. Contracts respecting personal chattels. Not generally enforced.

The general rule is, not to entertain jurisdiction for the specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature (*q*). But to this rule there are certain exceptions; or rather the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy.

Thus, in *Duncuft v. Albrecht* (*r*), the Vice-Chancellor, in decreeing specific performance of an agreement for the sale of a certain number of *shares* in a railway company, said: "Now, I agree that it has long since been decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of three per cents, or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market" (*s*). And similarly specific performance was decreed in the case of *Buxton v. Lister* (*t*), where Lord

Exceptions to general rule: (1.) Contract respecting shares in a railway company.

(*p*) *Adderley v. Dixon*, 1 S. & S. 610.

(*q*) *Pooley v. Budd*, 14 Beav. 34.

(*r*) 12 Sim. 199.

(*s*) *Doloret v. Rothschild*, 1 Sim. & Stu. 598; *Shaw v. Fisher*, 2 De G. & Sm. 11; *Odessa Tramways v. Mendel*, 8 Ch. Div. 235.

(*t*) 3 Atk. 385.

Hardwicke put the case of a ship-carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity, and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and his Lordship assumed that as, in both these cases, damages would not, by reason of the special circumstances, be a complete remedy, equity would decree a specific performance (*u*).

(2.) Sale of assigned debts under a bankruptcy.

In *Adderley v. Dixon* (*v*), where the plaintiffs had purchased and taken assignments of certain debts which had been proved under two commissions of bankruptcy, and had agreed to sell them to the defendant for 2s. 6d. in the pound, a specific performance of the agreement at the suit of the vendor was enforced, and the Vice-Chancellor said: "The present case, being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell those dividends at a conjectural price. It is true, that the present bill is not filed by the purchaser, but by the vendor, who seeks not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled by repeated decisions that the remedy in equity must be mutual, and that where a bill will lie for the purchaser, it will also lie for the vendor" (*w*).

(3.) Contracts as to rare and beautiful articles.

The court will also compel the specific delivery "of articles of unusual beauty, rarity, and distinction,

(*u*) *Adderley v. Dixon*, 1 Sim. & Stu. 607. (*v*) 1 Sim. & Stu. 607.

(*w*) *Wright v. Bell*, 5 Price, 325; *Kenny v. Weakham*, 6 Mad. 355; *Cogent v. Gibson*, 33 Beav. 557.

so that damages would not be an adequate compensation for non-performance" (x). In *Dowling v. Betjemann* (y), it was decided that the court has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remedy being inadequate. But where, by the terms of the agreement and the frame of the pleadings, the plaintiff, seeking restitution of a picture, had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and that there was no jurisdiction in a court of equity to interfere.

It has been repeatedly decided that it is within the jurisdiction of the court to compel the specific delivery up of heirlooms or chattels of peculiar value to the owner, and on the same grounds as in cases of agreement, that the specific thing is the object, and damages will not afford an adequate compensation (z). "Thus, the Pusey Horn, the patera of the Duke of Somerset, were things of such a character as a jury might (possibly) estimate by their weight; and this would obviously be a very inadequate and unsatisfactory measure of damages. In all cases, therefore, where the object of the suit is not open to compensation by damages, it would be strange if the law of this country did not afford any remedy; and great would be the injustice if an individual cannot have his property without being liable to the estimate of people who cannot value it as he does" (a).

The cases which have been referred to are not the only class of cases in which the court will entertain a suit for delivery up of specific chattels. For where a fiduciary relation subsists between the parties whether

(4.) Delivery up of heirlooms and other chattels of peculiar value.

(5.) Specific performance where a fiduciary relation exists.

(x) *Falcke v. Gray*, 4 Drew. 658.

(y) 2 J. & H. 544.

(z) *Somerset v. Cookson*, 1 L. C. 891; *Pusey v. Pusey*, 1 Vern. 273.

(a) *Fells v. Read*, 3 Ves. 70; *Macclesfield v. Davies*, 3 V. & B. 16; *Reece v. Trye*, 1 De G. & Sm. 273; *Beresford v. Driver*, 14 Beav. 387; 16 Beav. 134.

it be that of an agent or a trustee or a broker, or whether the subject-matter be stock or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of the power, and will compel a specific delivery up of the articles (b).

Common law powers as to specific delivery under 17 & 18 Vict., c. 125, and now under Judicature Acts, 1873-75.

The Courts of Common Law obtained under the Common Law Procedure Act of 1854 (c), after judgment in an action of detinue, the same jurisdiction to compel the return of a chattel as the Court of Chancery, but the latter court might have enforced its decree by attachment, whilst the Courts of Common Law could only have enforced restitution by distress (d). Under the Judicature Acts, however, the power of courts of law is now co-extensive in this respect with that of courts of equity. And under the 100th section of the Companies Act, 1862, relief that is substantially specific performance may be obtained on summons, without action, when the company is in liquidation (e).

II. Contracts respecting land.

Generally enforced, because damages at law no remedy.

II. Contracts respecting land.

The court is in the habit of interposing to grant relief in cases of contracts respecting real property to a far greater extent than in cases of contracts respecting personal property; and this upon the ground that with regard to contracts respecting personal property, if the contract is not specifically performed by the vendor, the purchaser may in general provide himself with other goods of a like description and quality with the damages which he acquires in the action, and in

(b) *Wood v. Rowcliffe*, 3 Hare, 304; 2 Ph. 383; *Pollard v. Clayton*, 1 K. & J. 462; *Edwards v. Clay*, 28 Beav. 145.

(c) 17 & 18 Vict., c. 125, s. 78.

(d) *Day's Com. Law Proc. Acts*, 249.

(e) *In re Oakwell Collieries Co.*, W. N. 1879, p. 65.

that way specifically perform (in effect) the contract for himself; but with regard to contracts respecting a specific messuage or specific parcel of land, the locality, character, vicinage, soil, and accommodations of the specific messuage or land may give it a peculiar and special value in the eyes of the purchaser, which cannot in general be replaced by any other messuage or land, although of the same precise value; so that damages would not be adequate relief (*f*), would not attain the object desired, and would generally frustrate the intentions of the purchaser. And the jurisdiction where it exists extends also to lands out of the jurisdiction, if the contracting parties are within it (*g*).

The Statute of Fraud says that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged with it; and a contract, in order to be specifically enforced, must, as a general rule, comply with these provisions of that statute (*h*); and yet the court is in the daily habit of relieving, where the party seeking relief has been put into a situation which makes it generally against conscience in the other party to insist on the want of writing so signed as a bar to the relief (*i*). It is proposed to inquire more particularly into the cases in which the court will grant specific performance notwithstanding the provisions of the statute have not been complied with.

Cases in which even the Statute of Frauds is broken in upon.  
(a.) If unconscientious to rely on it,—generally.

In the first place, then, the court would enforce a specific performance of a contract within the statute, and not in writing, where it was fully set forth in the bill, and was confessed by the answer of the defen-

(b.) Where the agreement is confessed by the defendant's answer.

(*f*) *Adderley v. Dixon*, 1 Sim. & Stu. 607.

(*g*) *In re Longdendale Cotton Spinning Co.*, 8 Ch. Div. 150; *Penn v. Lord Baltimore*, 2 L. C. 837.

(*h*) *Shardlow v. Cotterell*, 20 Ch. Div. 90.

(*i*) *Bond v. Hopkins*, 1 S. & L. 433.

Unless the defendant, notwithstanding, insists upon the defence.

dant (*j*),—*scil.* because the statute was designed only to guard against fraud, and in such a case there could be no danger of fraud; also, if the defendant did not insist on the defence, he might fairly be deemed to have waived it,—*Quisque renuntiare potest juri pro se introducto* (*k*). It was settled, however, that although the defendant by his answer confessed the parol agreement, he might insist by way of defence upon the protection of the statute, and such a defence was good (*l*); and the statute might now be pleaded by way of defence to the statement of claim in an action.

(c.) Where the contract is partly performed by the party seeking aid.

Secondly, The court would enforce specific performance of a contract within the statute where the parol agreement had been partly carried into execution by the party praying relief (*m*), and this upon the ground that otherwise one party would have been able to practise a fraud upon the other, contrary to the intention of the statute. And where one party has executed his part of the agreement in the confidence that the other party will do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice (*n*).

Part-performance,—what is?

In order to withdraw a contract on the ground of part-performance from the operation of the statute, several circumstances must concur.

(1.) Introductory or ancillary acts are not acts of part-performance.

(1.) Acts merely introductory or ancillary to an agreement are not considered as acts of part-performance thereof, although attended with expense; *e.g.*,

(*j*) *Att.-Gen. v. Sitwell*, 1 You. & Col. Exch. Ca. 559; *Gunter v. Halsey*, Amb. 586. (*k*) 1 Fonbl. Eq. B. 1 ch. 3, s. 8, note *d*.

(*l*) *Cooth v. Jackson*, 9 Ves. 37; *Blagden v. Bradbear*, 12 Ves. 466, 471; *Skinner v. M'Douall*, 2 De G. & Sm. 265.

(*m*) *Caton v. Caton*, L. R. 1 Ch. 137.

(*n*) *Nicol v. Tackaberry*, 10 Gr. 109; *Hussey v. Horn Payne*, 4 App. Ca. 311.

delivering an abstract of title, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, admeasuring the lands, registering conveyances, and acts of the like nature, are not sufficient to take a case out of the statute (o), but are merely acts for which damages for the loss of time and labour are an adequate compensation.

(2.) The acts of alleged part-performance must also be such as are not only referable to the agreement alleged, but are referable to that alone, and to no other title; for if they are referable otherwise, they will not take the case out of the statute, since they cannot properly be said to be done by way of part-performance of *the* agreement (p). Consequently, the mere possession of the land contracted for will not of itself be deemed a part-performance if it be wholly independent of the contract; therefore, where a tenant in possession sued for the specific performance of an alleged agreement for a lease, and set up his possession as an act of part-performance of the agreement, it was held not to be such, because it was referable otherwise than to the agreement, *i.e.*, to his character as tenant (q). So again, where a tenant from year to year continues in possession, and lays out such moneys on the farm as are usual in the ordinary course of husbandry, this is no part-performance of an agreement for a lease (r). But if the possession be delivered, and delivered and obtained *solely under the contract*; or if, in the case of a tenancy, the nature of the holding is made different from the original tenancy, as by the payment of a higher rent, or by other unequivocal

(2.) Acts of part-performance must be referable alone to the agreement alleged.

Mere possession of the land not an act of part-performance, if referable otherwise than to the agreement.

(o) *Hawkins v. Holmes*, 1 P. Wms. 770; *Pembroke v. Thorpe*, 3 Swanst. 437; *Whitchurch v. Bevis*, 2 Bro. C. C. 559, 566.

(p) *Gunter v. Halsey*, Amb. 586; *Lacon v. Martins*, 3 Atk. 4.

(q) *Wills v. Stradling*, 3 Ves. 378; *Morphett v. Jones*, 1 Swanst. 181.

(r) *Brennan v. Bolton*, 2 Dr. & War. 349.



circumstances, *referable solely and exclusively to the contract*, there the possession may take the case out of the statute. Especially will it be held to do so where the party let into possession has expended money in building and repairs or other improvements; for under such circumstances, if the parol contract were to be deemed a nullity, the expenditure would operate to his prejudice, and a fraud would have been practised upon him; and besides, he would be a trespasser (s).

(3.) The agreement must originally have been cognisable in a court of equity, independently of the acts of part-performance.

(3.) The mere want of writing to evidence the contract will not of course afford any ground for the court entertaining an action for the specific performance of it; in other words, the mere fact that the plaintiff cannot even recover damages for breach of the contract (not being able to prove it for want of the necessary written evidence), this will not of itself entitle him to specific performance; and it is only where the court has jurisdiction in the original subject-matter, viz., the contract, that the want of writing will not deprive the court of its jurisdiction where there has been part-performance (t). Also, where the possession taken is not under the contract, but is adverse to it, the circumstance that there is no legal remedy does not of itself suffice to give the court jurisdiction (u).

(4.) The acts done must not be capable of being undone; therefore payment of part or whole of purchase-money is not an act of part-performance, because repayment will put the parties into the same position as before.

(4.) Payment of a part or even of the whole of the purchase-money is not an act of part-performance so as to take a contract out of the Statute of Frauds (v); "for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest." Another reason alleged for the rule that

(s) *Lester v. Foxcroft*, 1 L. C. 828; *Aylesford's Case*, 2 Str. 783; *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Gregory v. Mighell*, 18 Ves. 328; *Pain v. Coombs*, 1 De G. & Jo. 34, 46.

(t) *Fry on Spec. Performance*, 179; *Kirk v. Bromley Union*, 2 Phil. 940.

(u) *East India Co. v. Veerasawmy Moodelly*, 7 Moo. P. C. C. 482.

(v) *Hughes v. Morris*, 2 De G. M. & G. 349.

"part-payment does not take the case out of the statute is, that the statute has said (*w*), with respect to goods, that part-payment shall operate as a part-performance; and the courts have therefore considered this as excluding agreements for lands, because when the Legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands" (*x*).

29 Car. II., c. 3,  
s. 17, provides for part-payment as to goods.  
*Expressio unius, exclusio alterius.*

(5.) Marriage alone is not a part-performance of a parol agreement in relation to it; for to hold this would be to overrule the Statute of Frauds, which enacts that every agreement in consideration of marriage, in order to be binding, must be in writing (*y*). But a parol contract may be taken out of the statute by acts of part-performance independently of the marriage. Thus, in *Surcombe v. Pinniger* (*z*), a father, previous to the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title-deeds. The husband also expended money upon the property. It was held that there had been sufficient part-performance of the parol contract to take the case out of the Statute of Frauds. "In this case," said Turner, L.J., "there is a part-performance by the delivering up of possession to the husband,—a fact which has always been held to change the situations and rights of the parties,—and there has been considerable expenditure by him on the property. There is, therefore, here what was wanting in *Lassence*

(5.) Marriage is not in itself part-performance, although not usually capable of being undone; but acts of part-performance independently of the marriage are a part-performance.

(*w*) Sec. 17.

(*x*) *Clinan v. Cooke*, 1 S. & L. 41; *Seagood v. Meale*, Prec. in Ch. 560.

(*y*) *Warden v. Jones*, 2 De G. & Jo. 76; *Caton v. Caton*, 1 L. R. Ch. 137; L. R. 2 Ho. of Lds. 127.

(*z*) 3 De G. M. & G. 571; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; 5 Ch. Div. 887.

v. *Tierney* (a)—acts of part-performance besides the marriage" (b).

A post-nuptial written agreement in pursuance of an ante-nuptial parol agreement enforced.

It seems that if there be "a written agreement after marriage, in pursuance of a parol agreement before marriage, this takes the case out of the statute" (c); and the reason is this, that the object of the 4th section of the Statute of Frauds was not to alter principles of law, but modes of evidence. Its object was to prevent the mischief arising from resorting to oral evidence to prove the existence of the terms of an alleged verbal agreement in certain specified cases, and, amongst the rest, an agreement made in consideration of marriage. It is obvious that there can be no ground to apprehend any such mischief where you have a writing signed after marriage by the party to be charged, and referring clearly to the terms of an ante-nuptial agreement. It is therefore sufficient if there be a memorandum clearly containing the terms of the agreement before the action or suit arises (d).

A representation for the purpose of influencing another, which has that effect, will be enforced. Where on marriage a third party makes a representation, on the faith

And it may be usefully mentioned here, with regard not only to parol marriage contracts, but to other parol contracts generally, that "a representation made by one party, although by parol, for the purpose of influencing the conduct of the other party, and acted on by the latter, will be sufficient, although never subsequently evidenced by writing, to entitle him to the assistance of the court for the purpose of making good such representation" (e); and it is a leading principle,

(a) 1 Mac. & G. 551.

(b) *Warden v. Jones*, 2 De G. & Jo. 84.

(c) *Turner, L.J.*, in *Surcombe v. Pinniger*, 3 De G. M. & G. 571; *Dundas v. Dutens*, 1 Ves. 196; *Barkworth v. Young*, 26 L. J. Ch. 157; *Peach*, on *Marr. Sett.* 81; but see *Lord Cranworth's* remarks in *Warden v. Jones*, 2 De G. & Jo. 85; also *Trowell v. Shenton*, L. R. 8 Ch. Div. 318. See also *Dashwood v. Jermyn*, 12 Ch. Div. 776.

(d) *Bailey v. Sweeting*, 30 L. J. C. P. 150; *Smith v. Hudson*, 6 N. R. 106.

(e) *Hammersley v. De Biel*, 12 Cl. & Fin. 62, 78; and see *Alderson v. Maddison*, 5 Exch. Div. 293; 7 Q. B. D. 174.

repeatedly adopted in equity, that where, upon the marriage of two persons, a third party makes a representation upon the faith of which the marriage takes place, he shall be bound to make his representation good (f); and an injunction has been granted to restrain the enforcement of a demand, the party seeking to enforce it having, while a marriage treaty was pending, falsely represented to the father of the lady that there was no such demand existing. "If," said Lord Thurlow, "any man, upon a treaty for any contract, will make a false representation, by means of which he puts the person bargaining under a mistake as to the terms of the bargain, it is a fraud—it misleads the parties contracting on the subject of the contract. . . . The principle upon which all the cases upon this subject have been decided is, that faith in such contracts is so essential to the happiness both of the parents and of the children, that whoever treats them fraudulently on such an occasion shall not only not gain, but shall even lose by it" (g). X

of which marriage takes place, he is bound to make it good.

X But of course, where the representation is not of an existing fact, but of a mere intention, or where a promisor will not bind himself by a contract, but gives the other party to understand that he must rely upon his honour for the fulfilment of his promise, in these cases, of course, the court will not enforce the performance of the representation or promise (h).

Representation of a mere intention, or a promise upon honour, not enforced.

A contract regarding lands will be taken out of the

(f) *Bold v. Hutchinson*, 20 Beav. 256; 5 De G. M. & G. 558; *Walford v. Gray*, 13 W. R. 335; Affd. Ib. 761; *Goldicutt v. Townsend*, 28 Beav. 445; *Prole v. Soady*, 2 Giff. 1; and especially *Barkworth v. Young*, 26 L. J. Ch. 157.

(g) *Neville v. Wilkinson*, 1 Bro. C. C. 543; *Montefiori v. Montefiori*, 1 Wm. Bl. 363; and distinguish *Caton v. Caton*, L. R. 1 Ch. 137; L. R. 2 Ho. of Lds. 127.

(h) *Maunsell v. White*, 1 Jo. & L. 539; 4 H. L. Cas. 1039; *Jorden v. Money*, 15 Beav. 372; 2 De G. M. & G. 318; 5 Ho. of Lds. Cas. 185.

(d.) Where agreement concerning land is not put into writing by fraud of one of the parties.

operation of the statute, where the agreement is intended to be put into writing according to the statute, but that is prevented from being done by the fraud of one of the parties. In such a case courts of equity have said that the agreement shall be specifically executed, for otherwise the statute, designed to suppress fraud, would be the greatest protection to fraud; *e.g.*, if a man should treat for a loan of money on mortgage, and the conveyance was to be by an absolute deed of the mortgagor and a defeasance by the mortgagee, and, after the absolute deed is executed, the mortgagee fraudulently refuses to execute the defeasance, equity will decree a specific performance (i).

*Grounds of defence to a suit for specific performance.*

It is now proposed to consider the principal defences that may be set up to a suit for specific performance, premising that the Statute of Frauds, the application of which has been already expounded, is one of the principal and most frequent of these defences.

(1.) Misrepresentation by plaintiff having reference to the contract.

A misrepresentation having relation to the contract, made by one of the parties to the other, is a ground for refusing the interference of the court at the instance of the party who has made the misrepresentation, and may, in certain cases, be a ground for its active interference in setting aside the contract, at the instance of the party deceived (j).

(2.) Mistake rendering specific performance a hardship.

Mistake is also a ground of defence; for the court not only requires that there must be an agreement binding at law, but that the contract must be more than merely legal, must not be hard or unconscionable; must be free from fraud, from surprise, and from mis-

(i) *Maxwell v. Montacute*, Prec. Ch. 526; *Joynes v. Statham*, 3 Atk. 389; *Lincoln v. Wright*, 4 De G. & Jo. 16.

(j) *Edwards v. M'Leay*, Coop. 308; *Baskcomb v. Beckwith*, L. S. 8 Eq. 100; *Talbot v. Hamilton*, 4 Gr. 200; *Fry on Spec. Perf.* 191; and see *Henty v. Schröder*, 12 Ch. Div. 666; *Kinnaird v. Smith*, W. N., 1881, p. 82.

take; for where there is a mistake, there is not that consent which is essential to a contract in equity: *non videntur qui errant consentire* (k). Also, it is a settled rule of the court to admit parol evidence, not merely for the purpose of proving a mistake by way of defence to a suit for specific performance, but for the purpose of correcting the mistake. This admission of such evidence is not a breach of the Statute of Frauds; because it should be remembered that the statute says, "No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement;" but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left as it was before the statute: the statute does not say that a written agreement shall bind, but that an unwritten agreement shall not bind.

Parol evidence of mistake is admitted notwithstanding the statute.

The statute does not say a written agreement shall bind, but that an unwritten agreement shall not bind.

not bind (l).

It follows from what has been stated, that where the defendant has been led into any error or mistake, the plaintiff cannot enforce the contract. Thus, in one case (m), a professional man was relieved at his own suit from an error in a deed of his own drawing. On the same principle, in *Malins v. Freeman* (n), where an estate was purchased at an auction under a mistake as to the lot put up for sale, and the mistake arose wholly through the carelessness of the defendant, it was held

(3.) Error of defendant, although attributable to defendant's own negligence.

(k) Fry on Spec. Perf. 212; and see *Jones v. Clifford*, L. R. 3 Ch. Div. 779.

(l) *Clinan v. Cooke*, 1 Sch. & Lef. 39.

(m) *Ball v. Storie*, 1 S. & S. 210.

(n) 2 Keen, 25, 34; and distinguish *Jefferys v. Fairs*, L. R. 4 Ch. Div. 448; *Tamplin v. James*, 15 Ch. Div. 215.

that specific performance would not be enforced. The Master of the Rolls said: "The defendant submits that he entered into it by error and in mistake, and that he ought not to be compelled specifically to perform it. Certainly, if the defendant did fall into any mistake, it cannot be ascribed to the conduct of the plaintiff. The plaintiff and his agents in no respect contributed to it, and if the defendant, by his carelessness, has caused any injury or loss to the plaintiff, he is accountable for it." And the following remarks of the same learned judge are peculiarly valuable, as illustrating the distinction between the legal right to damages, and the equitable favour in the nature of, but not amounting absolutely to, a right to specific performance:—

Damages and specific performance, — distinguished.

"But the defendant may be answerable for damages at law without being liable to a specific performance in this court. In cases of specific performance, the court exercises a discretion, and knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach of contract, will not, in all cases, decree a specific performance; as in cases of intoxication, although the party may not have been drawn into drink by the plaintiff, yet, if the agreement was made in a state of intoxication, the court will not decree a specific performance. And the question here is not, as it has been put, whether the alleged mistake, if true, is one in respect of which the court will relieve, for the court is not here called upon to relieve the defendant from his legal liability, but whether, if the mistake be proved, the court will enforce a specific performance, or leave the defendant to his legal liability. And I think that if such a mistake as is here alleged to have happened be made out, a specific performance ought not to be decreed. . . . I am of opinion that the defendant never did intend to bid for this estate. He was hurried and inconsiderate,

Contract not enforced where defendant did not intend to purchase or to sell.

and when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it. It is probable that, by his conduct, he occasioned some loss to the plaintiff; for that he is answerable, if the contract was valid, and will be left so, notwithstanding the decision to be now made. But I think that he never meant to enter into this contract, and that it would not be equitable to compel him to perform it, whatever may be the responsibility to which he is left liable at law" (o). The defence of a want of *assensus ad idem* between the parties would, it may be here observed, be a defence not only to any decree for specific performance (p), but also to any legal claim for damages,—*scil.* because without such an assent there is no contract at all.

We may here proceed to consider the effect of a mistake or parol variation, set up by the defendant as a ground for refusing the specific performance of a written agreement alleged by the plaintiff (q).

Effect of mistake, where a parol variation is set up as a defence.

(a.) Where the parol variation set up by the defendant shows that, after the parties to the contract had mutually agreed with each other, an error occurred in the reduction of the agreement into writing, and it appears that the written agreement, varied according to the defendant's contention, represents the true contract between the parties, the court will, it seems, where there has been no fraud, enforce specific performance of the contract so varied. Thus, where a bill was brought for the specific performance of an agreement to grant a lease at a rent of £9 per annum, and the defendant insisted that it ought to have been a term of the agreement that the plaintiff should pay all taxes,

(a.) Where the error arose in the reduction of the agreement into writing, specific performance decreed with parol variation set up by the defendant.

(o) *Manser v. Back*, 6 Hare, 443; *Alvanley v. Kinnaird*, 2 Mac. & G. 7; *Bazendale v. Seale*, 19 Beav. 601; *Wood v. Scarth*, 2 K. & J. 33.  
(p) *Marshall v. Bertridge*, 19 Ch. Div. 233; *May v. Thomson*, 20 Ch. Div. 705.

(q) See generally Fry on Spec. Perf. 216-236.



Plaintiff cannot obtain specific performance with parol variation of written agreement.

Lord Hardwicke granted specific performance, and directed that the terms of the verbal agreement should be carried out by the covenants to be inserted in the lease (r). On the other hand, although a defendant, resisting specific performance, may go into parol evidence to show that, by fraud, accident, or mistake, the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of obtaining specific performance with a variance, excepting only in the following class of cases, namely:—

Exception—unless the parol variation be in favour of the defendant.

Where a plaintiff alleges a parol variation in favour of the defendant, and offers to perform the agreement with the variation, the court will enforce specific performance, though the defendant should plead the statute. Thus, where the defendant agreed in writing to grant the plaintiff a lease at a specified rent and for a specified term, and the plaintiff filed a bill for specific performance, stating the above agreement, and that it was further agreed that he, the plaintiff, should pay a premium of £200, which, by his claim, he offered to do; the defendant, acknowledging that the terms were such as the plaintiff represented them, insisted that, as the written agreement did not provide for those terms, the statute was a good defence. It was held, however, that this additional term did not render the statute a good defence, and Knight Bruce, L.J., said: “Our opinion is, that when persons sign a written agreement upon a subject obnoxious, or not obnoxious, to the statute that has been so particularly referred to (s), and there has been no circumvention, no fraud, nor (in the sense in which the term ‘mistake’ must be considered as used for the purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to which has not been inserted in the docu-

(r) *Joyes v. Statham*, 3 Atk. 388.

(s) 29 Car. II., c. 3.

ment; subject to this, that either of the parties sued in equity upon it may perhaps be entitled, in general, to ask the court to be neutral, unless the plaintiff will consent to the performance of the omitted term" (t). In such cases as these, the court interferes for the purpose of reforming the contract, and not rescinding it. "No doubt," says Lord Hardwicke (u), "but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that, if reduced into writing contrary to intent of the parties, on proper proof, that would be rectified."

The defendant may ask the court to be neutral, unless the plaintiff will perform the omitted term.

The case of *Townshend v. Stangroom* (v) affords a strong illustration of the above-mentioned distinction between the rights of a plaintiff and of a defendant setting up a parol variation to a written contract. There a lessor filed a bill for the specific performance of a written agreement for a lease, with a variation as to the quantity of land to be included in the lease, supported by parol evidence. The lessee filed a cross-bill for specific performance of the written agreement without the parol variation. Lord Eldon dismissed both bills; the first, because the parol evidence was not admissible on behalf of the lessor seeking specific performance; the second, because it was admissible when adduced by such lessor, as *defendant*, for the purpose of showing that by mistake or surprise the written agreement did not contain the terms intended to be introduced into it (w).

*Townshend v. Stangroom*, — as to difference between plaintiff seeking and defendant resisting specific performance.

But where the mistake or parol variation set up by the defendant does not show a mere mistake in the reduction of the contract into writing, but that one

*Secus*, where a misunderstanding as to terms of agreement.

(t) *Martin v. Pycroft*, 2 De G. M. & G. 785; *Parker v. Taswell*, 2 De G. & Jo. 559.

(u) *Henkle v. Roy. Ex. Assoc. Co.*, 1 Ves. Sr. 317.

(v) 6 Ves. 328; *Smith v. Wheatcroft*, 9 Ch. Div. 223.

(w) *Woollam v. Hearn*, 2 L. C. 468.

3, party understood one thing and the other another, there is no contract at all in such a case, for want of the *assensus ad idem*, and the plaintiff's bill is consequently dismissed (x). Also, when the written contract is ambiguous in itself, the plaintiff cannot as a matter of right obtain specific performance of it, construed in the way that he has construed it, if the defendant has construed it in a different way (y).

(b.) Where the parol variation is subsequent to the contract.

4.

(b.) Where the parol variation, which the plaintiff or defendant seeks to set up, is a subsequent agreement in parol between the parties to a written agreement, the case in nowise comes within the doctrine of mistake, and the parol variation is inadmissible under the Statute of Frauds, except in cases where the refusal to perform it might amount to fraud (z); or unless there have been such acts of part-performance as would justify a decree in the case of an original substantive agreement (a).

(4.) Misdescription,—according as it is substantial or not.

Another common ground of defence to an action for specific performance is, that, by a misdescription of the property, the defendant has purchased what he never intended to purchase. Under this defence, two classes of cases arise:—

1. Cases where the misdescription is of a substantial character, and will not, in justice, admit of compensation; and

2. Cases where the misdescription is of such a character as fairly to admit of compensation.

In cases of substantial misdescription.—The prin-

(x) *Legal v. Miller*, 2 Ves. Sr. 209; *Marshall v. Berridge*, 19 Ch. Div. 233. (y) *Marshall v. Berridge*, *supra*.

(z) See observations of Sir W. Grant in *Price v. Dyer*, 17 Ves. 364.

(a) *Legal v. Miller*, 2 Ves. Sr. 209; *Van v. Corpe*, 3 My. & K. 269, 277.

ciple governing this class of cases is thus summed up by Lord Eldon (b):—"The court is, from time to time, approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take at all that which he did not mean to have."

Where the misdescription of a substantial character, it is a good defence.

The question whether a misdescription is a substantial one or not, is one concerning which no general rule can be laid down. Each case will be decided on its own particular facts.

Whether misdescription is substantial, is a matter of evidence.

(A.) Cases where vendor seeks specific performance. (A.) Purchaser

Where property sold as copyhold turned out to be partly freehold, it was held that the vendor could not compel specific performance, notwithstanding a special condition providing that errors in the description should not invalidate the sale. It was insisted for the vendor that freehold was better than copyhold, but the Master of the Rolls said: "It is impossible to enter into a consideration of the different motives which may induce a person to prefer property of one tenure to another. *The motives and fancies of mankind are infinite*, and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another" (c).

not compelled to take,—  
(a.) Freehold instead of copyhold.

So a purchaser is not compelled to take an under-lease instead of an original lease (d). So again, where a wharf and jetty were contracted to be sold, and it turned out that the jetty was liable to be removed by the Corporation of London, specific performance was

(b.) Under-lease instead of original lease.

(b) *Knatchbull v. Grueber*, 3 Mer. 146; and see *Jaques v. Millar*, L. R. 6 Ch. Div. 153.

(c) *Ayles v. Cox*, 16 Beav. 23; *Drewe v. Corp.*, 9 Ves. 368; *Wright v. Howard*, 1 S. & S. 190; *Hart v. Swaine*, L. R. 7 Ch. Div. 42; and see *Arnold v. Arnold*, 14 Ch. Div. 270.

(d) *Madeley v. Booth*, 2 De G. & Sm. 718.

refused (e). In the case of the sale of a residence and four acres of land, it having turned out that there was no title to a slip of ground of about a quarter of an acre between the house and the highroad, the Master of the Rolls said: "Under ordinary circumstances, this would be a case for compensation; but here is a house, with a long strip of land between it and the road, to which there is no title, so that the people in passing can look in at the window. This is not a case for compensation" (f).

Where the difference is slight, and a proper subject for compensation, it will be enforced with compensation, as where acreage is deficient.

Where, however, in the eye of the court the difference is not material, and is such that it is a proper subject for compensation, the court will enforce the contract at the suit of the vendor, compelling him to make compensation to the purchaser. For example, where there was an objection to the title of six acres out of a large estate, and these did not appear material to the enjoyment of the rest (g), specific performance was nevertheless decreed. So again, where fourteen acres were sold as water-meadow, and twelve only answered that description, it was held a fit subject for compensation (h). And, *nota bene*, that after conveyance of the estate, there can be no claim made for compensation, *semble* (i).

No compensation where there has been fraud.

The principle of granting compensation in lieu of rescinding the contract, in case of any error or misstatement, will never be applied where there has been fraud or misrepresentation (j). It is also a necessary

(e) *Peers v. Lambert*, 8 Beav. 546; and distinguish *Camberwell Building Society v. Holloway*, 13 Ch. Div. 754.

(f) *Perkins v. Ede*, 16 Beav. 193; *Knatchbull v. Grueber*, 3 Mer. 124.

(g) *M'Queen v. Farquhar*, 11 Ves. 467; *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609.

(h) *Scott v. Hanson*, 1 R. & M. 128.

(i) *Manson v. Thacker*, 7 Ch. Div. 620; *Besley v. Besley*, 9 Ch. Div. 103; *Allen v. Richardson*, 13 Ch. Div. 524; but see *In re Turner and Skellon*, 13 Ch. Div. 130.

(j) *Clermont v. Tasburgh*, 1 J. & W. 120; *Price v. Macaulay*, 2 De G. M. & G. 339, 344; but see *Powell v. Elliott*, L. R. 10 Ch. App. 424.

principle that where there are no data from which the amount of compensation can be ascertained, the court cannot enforce the contract with compensation. But this objection is one which the courts are unwilling to entertain (*k*).

Nor where the compensation cannot be estimated.

(B.) Where purchaser seeks specific performance.

(B.) Purchaser can compel specific performance, and may at the same time insist on an abatement.

The law is thus laid down by Sir William Grant in *Hill v. Buckley* (*l*):—"Where a misrepresentation is made as to the quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation." "If," observes Lord Eldon, "a man, having partial interests in an estate, chooses to enter into a contract representing it, and agreeing to sell the estate as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under these circumstances is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the court will not hear the objection of the vendor, that the purchaser cannot have the whole" (*m*).

Vendor must sell what interest he has, if purchaser elect.

Courts of equity will not, however, at the suit of a purchaser, compel a partial performance of a contract which is unreasonable or prejudicial to third parties interested in the property (*n*), nor where the deficiency

Partial performance not compelled where unreasonable or prejudicial to third parties.

(*k*) *Ramsden v. Hirst*, 4 Jur. N.S. 200; *Brooke v. Rounthwaite*, 5 Hare, 298; *Powell v. Elliott*, *supra*.

(*l*) 17 Ves. 401; *Horrock v. Rigby*, 9 Ch. Div. 180; but see *Durham v. Legard*, 34 L. J. Ch. 589.

(*m*) *Mortlock v. Buller*, 10 Ves. 315; *Wilson v. Williams*, 3 Jur. N.S. 810; *Seaman v. Vawdrey*, 16 Ves. 390; *Painter v. Newby*, 11 Hare, 26; *Barker v. Cox*, L. R. 4 Ch. Div. 464; *M'Kenzie v. Heslith*, L. R. 7 Ch. Div. 675.

(*n*) *Thomas v. Dering*, 1 Keen, 729; *Beeton v. Stutley*, 6 W. R. 206.

as to the extent or duration of an interest contracted to be sold does not admit of compensation (*o*).

(5.) Lapse of time.

At law, time always of the essence of the contract.

Equity is guided by the nature of the case as to time.

When lapse of time is a bar in equity.

(a.) Where time was originally of the essence of the contract.

The objection that a plaintiff has not performed his part of the contract at the time specified, may furnish grounds of defence to suits for specific performance. At law, the plaintiff must (prior to the Judicature Acts) have shown that all those things which are on his part to be performed have been performed within a reasonable time, or, where time is specified by the contract, within the time so specified. At law, time used to be always of the essence of the contract (*p*); but in equity, the question of time was differently regarded; for a court of equity discriminated between those terms of a contract which were formal, and a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which were of the substance and essence of the agreement (*q*); and applying to contracts those principles which had governed its interference in relation to mortgages (*r*), it held time to be *prima facie* non-essential, and accordingly granted specific performance in general of agreements after the time for their performance had been suffered to pass, by the party asking for the intervention of the court, if the other party had not shown a determination to proceed. There were, however, certain cases where lapse of time was a bar to relief even in equity. Thus—

(a.) Those cases where time was originally of the essence of the contract; and this whether made so by the express agreement of the parties (*s*), or from

(*o*) *Balmanno v. Lumley*, 1 V. & B. 225; *Ridgway v. Gray*, 1 Mac. & G. 109.

(*p*) *Stowell v. Robinson*, 3 Bing. N. C. 928.

(*q*) *Parkin v. Thorold*, 16 Beav. 59.

(*r*) Per Lord Eldon in *Seton v. Slade*, 7 Ves. 273.

(*s*) *Hudson v. Bartram*, 3 Mad. 440; *Honeyman v. Marryat*, 21 Beav. 14, 24.

the nature of the subject-matter with which the parties were dealing, as in the case of reversionary interests (*t*).

(*b*.) Those cases where, though time was not originally of the essence of the contract, it was engrafted upon it by subsequent notice (*u*),—such notice being reasonable (*v*).

(*b*.) Where time was made of the essence of the contract by subsequent notice.

(*c*.) Cases where the delay had been so great as to constitute laches, disentitling the party to the aid of the court, and evidencing an abandonment of the contract, irrespectively of any peculiar stipulations as to time (*w*); but in none of the cases has a delay under twelve months been held, when unaccompanied by other circumstances, to amount to evidence of abandonment.

(*c*.) Where lapse of time was evidence of laches or abandonment.

And now the rules of equity as to whether time is or not of the essence of the contract prevail at law also (*x*).

Law and equity now agree.

It has already been pointed out that courts of equity will never countenance fraud, and that where there is reason to believe that a contract is tainted with fraud, the court will refuse relief unless the party seeking its aid comes with clean hands, and has a conscientious title to relief (*y*). If, therefore, there has been actual misrepresentation (*z*), or fraudulent suppression

(*6*.) The plaintiff has not "clean hands."

(*t*) *Hipwell v. Knight*, 1 Y. & C. Exch. Ca. 416; *Withy v. Cottle*, T. & R. 78; *Walker v. Jeffreys*, 1 Hare, 341.

(*u*) *Taylor v. Brown*, 2 Beav. 180; *Benson v. Lamb*, 9 Beav. 502; *Macbryde v. Weekes*, 22 Beav. 533.

(*v*) *Crawford v. Toogood*, 13 Ch. Div. 153; *Green v. Sevin*, 13 Ch. Div. 589.

(*w*) *Moore v. Blake*, 2 Ball. & B. 62; *Milwards v. Thanet*, 5 Ves. 720 n; *Eads v. Williams*, 4 De G. M. & G. 691; *Mills v. Haywood*, L. R. 6 Ch. Div. 196.

(*x*) Judicature Act, 1873, s. 25, sub-sec. 7; *Noble v. Edwards*, 5 Ch. Div. 378.

(*y*) *Harnett v. Yielding*, 2 S. & L. 554; *Reynell v. Spyre*, 1 De G. M. & G. 660; *Post v. Marsh*, 16 Ch. Div. 395.

(*z*) *Brooke v. Rounthwaite*, 5 Hare, 298; *Higgins v. Samels*, 2 J. & H. 460; *Farebrother v. Gibson*, 1 De G. & Jo. 602.



of the truth (*a*), equity will refuse to enforce specific performance; and the defrauded person may even rescind the contract (*b*).

(7.) Great hardship in the contract.

Although, as a general rule of equity, inadequacy of consideration, except in cases of sales of reversionary interests (*c*), and except where fraud or imposition is presumed, is not a ground for refusing specific performance (*d*); still, as the aid by equity in such cases is discretionary, a contract which would work a great hardship will not be enforced, but the plaintiff will be left to his remedy at law (*e*).

(8.) The contract involves the doing of an unlawful act or breach of trust.

So again, as we have already seen, specific performance of an agreement to perform an unlawful act (*f*), or which would involve the breach of any prior contract (*g*), or a breach of trust, will not be enforced (*h*).

(9.) The contract is not established.

Also, if the alleged contract is no contract, that is, if it is not a complete contract as such, but is incomplete as a contract simply, whether because of some condition precedent not having been performed or from any other cause whatever, the court will not enforce specific performance of it, because that would first be to make the contract (*i*). But a mere uncertainty in the amount of the land agreed to be sold, if that un-

(*a*) *Drysdale v. Mace*, 5 De G. M. & G. 103; *Shirley v. Stratton*, 1 Bro. C. C. 440.

(*b*) *In re Bannister*, W. N. 1879, p. 64.

(*c*) *Playford v. Playford*, 4 Hare, 546; and see *supra*, p. 472.

(*d*) *Sullivan v. Jacob*, 1 Moll. 477.

(*e*) *Wedgwood v. Adams*, 6 Beav. 600, 8 Beav. 103; *Watson v. Marston*, 4 De G. M. & G. 230, 239; *Tildesley v. Clarkson*, 30 Beav. 419; *Peacock v. Penson*, 11 Beav. 355.

(*f*) *Howe v. Hunt*, 31 Beav. 420; *Harnett v. Yielding*, 2 Sch. & Lef. 554.

(*g*) *Wilmott v. Barber*, 15 Ch. Div. 96.

(*h*) *Mortlock v. Buller*, 10 Ves. 292; *Rede v. Oakes*, 13 W. R. 303; *Sneeshy v. Thorne*, 7 De G. M. & G. 399.

(*i*) *Rosnier v. Miller*, L. R. 5 Ch. Div. 648; on app. 3 App. Ca. 1124; *Williams v. Jordan*, L. R. 6 Ch. Div. 517; *Winn v. Bull*, L. R. 7 Ch. Div. 29; *Hudson v. Buck*, L. R. 7 Ch. Div. 683; but distinguish *Bonnewell v. Jenkins*, 8 Ch. Div. 70.

certainty is removable upon an inquiry, will not bar the right to specific performance (*j*).

And finally, if the contract relates to or comprises property to which the vendor is unable to make a title, no decree for specific performance will be made (*k*); so also if the title which he purports to make is too doubtful to be forced on a purchaser (*l*). But the title which the purchaser may require is usually only such a title as the conditions of the sale entitle him to; *e.g.*, it may be only a "good holding title" (*m*), and not necessarily what is called a "marketable title;" but a misleading condition will not be permitted to prejudice the purchaser in this respect (*n*).

(10.) The vendor cannot make a title.

When the court has decreed specific performance, it will direct the conveyance in execution thereof to be settled in Chambers in case the parties should differ as to the same or as to any open clause therein (*o*); but any such open clause, if sufficiently in issue on the pleadings, will be decided by the court itself at the trial of the action.

Conveyance.—when to be settled by the court.

Regarding the effect of taking possession, it may be stated generally, that (subject to anything to the contrary in the conditions of sale) the purchaser becomes liable to all outgoings, *e.g.*, charges for street-improve-

Possession,—effect of taking, pending completion of contract.

(*j*) *Chattock v. Muller*, 8 Ch. Div. 177; and see *Tress v. Savage*, 4 Ell. & Black. 36; *Haigh v. Jaggard*, 16 Mee. & Wel. 525; 2 Coll. Ch. Ca. 231; and distinguish *Parker v. Taswell*, 2 De Gex. & Jo. 559.

(*k*) *Lawrie v. Lees*, 14 Ch. Div. 249; 7 App. Ca. 19; *Palmer v. Locke*, 18 Ch. Div. 381; and consider *Truscott v. Diamond Rock Boring Co.*, 20 Ch. Div. 251.

(*l*) *Pyrke v. Waddingham*, 10 Ha. 1; *Palmer v. Locke*, *supra*; and see *Treloar v. Bigge*, L. R. 9 Exch. 191; *Sear v. House Property and Investment Society*, 16 Ch. Div. 387.

(*m*) *Broad v. Munton*, 12 Ch. Div. 131.

(*n*) *Broad v. Munton*, *supra*; *In re Tanqueray, Willaume, & Landan*, 20 Ch. Div. 465.

(*o*) *Hart v. Hart*, 18 Ch. Div. 670.

ments (*p*), and to pay interest on his unpaid purchase-money, even although the property should be untenanted or otherwise producing no rent (*q*); and such taking of possession, unless otherwise specially guarded, amounts to an acceptance of the title; and under a sale by the court, the taking of possession is always an implied acceptance of the title.

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(*p*) *Midgeley v. Coppock*, 4 Exch. Div. 309.

(*q*) *Ballard v. Strutt*, 15 Ch. Div. 122.

## CHAPTER X.

## INJUNCTION.

AN injunction is an order (and used to be a writ issuing under an order) of a court of law or equity,—an order (or writ) remedial, the general purpose of which is to restrain the commission or continuance of some wrongful act of the party enjoined (*a*). Definition.

The object of the writ or order is generally preventive and protective rather than restorative, although it may also in exceptional cases or indirectly be restorative. It seeks to prevent a meditated wrong more often than to redress an injury already done; and it is not confined to cases falling within the exercise of the concurrent jurisdiction of the court; but it equally applies to cases belonging to its exclusive jurisdiction. Its object is preventive rather than restorative.

The writ of injunction was, and the order in the nature of such writ still is, peculiarly an instrument of the court in its Chancery Division, though there were some cases where courts of law, even before the Common Law Procedure Act, 1854, and the Judicature Acts, 1873–75, were accustomed to exercise analogous powers, as by the writ of prohibition and estrepement in cases of waste (*b*). The cases, however, to which these common law processes were applicable were so few, and the processes themselves were so utterly inadequate for the purposes of justice, that the Jurisdiction of equity arose from want of adequate remedy at law.

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(*a*) *Joyce on Injunctions*, I.

(*b*) *Jefferson v. Bishop of Durham*, 1 Bos. & P. 105, 120–132.

jurisdiction at law fell practically into disuse, and almost all remedial justice of this sort came to be administered through the instrumentality of courts of equity. The jurisdiction of these courts, then, had its true origin in the fact that there was either no remedy at all at law, or else an imperfect and inadequate remedy.

The cases in which courts of equity interfered by way of injunction were usually classed under two heads:—

Two classes of injunctions prior to Judicature Acts.

- I. Injunctions to prevent the inequitable institution or continuance of judicial proceedings (c); and
- II. Injunctions to restrain wrongful acts unconnected with judicial proceedings.

Judicature Acts,—the changes effected by.

But now, under the Judicature Act (d), 1873, s. 24, sub-sect. 5, no cause or proceeding pending in the High Court of Justice or before the Court of Appeal shall be restrained by injunction, excepting in a bankruptcy or winding-up proceeding, after order made (e); but every matter of equity, which would formerly have been a ground for an injunction, either absolute or conditional, may now be pleaded as a defence to the action, and the court or division before which the action is pending may upon the like grounds direct a stay of proceedings in the action, either general or interim, or make such other order or give such other judgment as shall appear to be just. And by the same Act, s. 25, sub-sect. 8, an injunction may be granted by an interlocutory order of the court in all cases in which it shall appear to the court to be "just or convenient" (f) that such order should be made,

(c) *Cercle Restaurant v. Lavery*, 18 Ch. Div. 555.

(d) 36 & 37 Vict., c. 66.

(e) *In re Landore Siemens Steel Co.*, 10 Ch. Div. 489.

(f) *Day v. Brownrigg*, 10 Ch. Div. 294.

and the order may be either with or without any conditions, and either before, or at, or after, the trial of the action, against any threatened or apprehended waste or trespass, and whether or not the person sought to be enjoined is in possession under any claim of title or otherwise, or (not being in possession) claims the right merely to do the act in question, and irrespectively of the circumstance of the estates of the parties, or of any or either of them, being legal or equitable.

In consequence of these provisions of the Judicature Act, injunctions properly so called now fall for the most part under one head only, that is to say, the second of the two heads above mentioned; and all orders in the nature of an injunction which prior to that Act fell under the first of these two heads, would now be orders staying proceedings merely, or such other orders or judgments as the court of equity would itself have made if it had had the cognisance of the action (g).

Instead of injunction of first class, now order to stay proceedings.

Premising thus much, we propose to state, firstly, the cases in which formerly an injunction would have issued, but now only a stay of proceedings or some other like remedial order; and, secondly, the cases in which an injunction properly so called may still issue.

I. Injunctions to restrain judicial proceedings, and now being merely orders to stay the proceedings, or other like remedial orders.

I. Orders to stay proceedings,—cases for.

But before entering into particulars upon this branch of the subject, it must be premised that at first sight it might have seemed that a court of equity in grant-

The old injunction in equity did not interfere

(g) *Wright v. Redgrave*, 11 Ch. Div. 24.

with the jurisdiction of the common law courts.

Equity acted *in personam* on the conscience of the person enjoined.

Courts of equity might restrain proceedings in a foreign court, if the parties were within their jurisdiction, and they may still do so.

ing an injunction against a proceeding in a court of common law, detracted from the dignity of the latter court and interfered with its process; and until the reign of James I., the common law judges as strenuously resisted this exercise of equitable jurisdiction as the Chancellors asserted it (*h*). But there was no just foundation for this opposition of the courts of common law, the writ of injunction not being in any real sense a prohibition to those courts in the exercise of their jurisdiction. It was not addressed to those courts; it was directed *only to the parties*; and it was granted on the sole ground that from certain equitable circumstances, of which the court of equity had cognisance and the court of law had not, it was against conscience that the party inhibited should proceed in the cause. In all cases, *e.g.*, where by accident, mistake, fraud, or otherwise, a party had an unfair advantage in proceeding in a court of law, and it was against conscience that he should use that advantage, a court of equity would restrain him; and in the like case the Queen's Bench Division would now do the like justice in the premises, either by admitting the equitable defence, or by staying the proceedings on the ground thereof.

Upon the same principle, although the courts of one country had no authority to stay proceedings in the courts of another, they had an undoubted authority to control all persons and things within their own territorial limits; for equity acted *in personam*, according to the maxim expounded in chapter ii. of this book, *supra*. Where, therefore, both parties to a suit in a foreign country were resident within the jurisdiction of the court of equity, it would restrain either party from proceeding in a suit out of its jurisdiction, and this not as pretending to direct or control the foreign

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(*h*) Hallam's Const. Hist. vol. i. p. 472.

court, but considering the equities between the parties, and decreeing *in personam* according to those equities, and also enforcing obedience to their decrees by process *in personam* (i). And, *semble*, any division of the court may now do the like in a proper case.

We may proceed now to enumerate some of the particular cases in which a court of equity granted this mode of relief, and in which at the present day a stay of proceedings in the action, or other like remedial order, would be directed or made.

Equity granted relief where the remedy at law would be complete if proofs could be had; and also in cases of purely equitable rights.

1. Where an instrument had been obtained by fraud or undue influence, the court of equity would restrain proceedings at law on it. Thus, where a young man, an officer in the army, soon after coming of age, became liable upon bills of exchange, for the accommodation of his superior officer, to the defendant, a money-lender by profession; and upon negotiations for getting in the bills, the defendant agreed to postpone them for twelve months, and induced the plaintiff, upon representations of his trouble and expense in procuring the postponement of the bills, to give him, in consideration of such trouble and expense, a further promissory-note; the court not finding in the answer a satisfactory explanation of these transactions, sustained an injunction against the defendant proceeding at law upon his securities (j). In the like case, the court of law would direct a stay of proceedings in the action, or would entertain the equitable defence, and might even dismiss the action altogether or direct a verdict for the defendant.

(i.) Equity restrained proceedings on an instrument obtained by fraud or undue influence; and now a stay of proceedings may be directed in such a case.

2. Suppose, again, an executor or administrator should be in possession of abundant assets to pay all the debts

(2.) Where assets had been lost by

(i) *Portarlington v. Soulby*, 3 My. & K. 106; *Hope v. Carnegie*, L. R. 1 Ch. 320; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416-437.

(j) *Lloyd v. Clark*, 6 Beav. 309; *Tyler v. Yates*, L. R. 11 Eq. 265.



an executor or administrator without his default, equity restrained proceedings at law by creditors; and now a stay of proceedings may be directed in such a case.

of the deceased, and by an accidental fire, or by a robbery, without any default on his part, a great portion of them should be destroyed, so that the estate should be deeply insolvent; in such a case he might have been sued by a creditor at law, and would have had no defence; for when he once became chargeable with the assets at law, he was for ever chargeable, notwithstanding any intervening casualties. But courts of equity would restrain proceedings at law in cases of this sort, upon the purest principles of justice (*k*); and now the courts of common law would stay the proceedings, or give judgment for the plaintiff to the extent only of the assets not destroyed (*l*).

(3.) A party who had only an equitable title protected against one who had a bare legal title.

3. So again, where a party had only an equitable title, a plaintiff at law having only a legal title would be restrained from pursuing that title in a court of common law. Thus, in *Newlands v. Paynter* (*m*), personal chattels were bequeathed to a single woman for her separate use, but without the intervention of trustees, so that the property legally belonged to (*i.e.*, the legal estate was in) her husband upon her subsequent marriage with him; and after the marriage this property was taken in execution for the debt of her husband, who at law was (as already stated) the legal owner: it was held, however, that the husband was a trustee for his wife, and an injunction was issued to restrain the sale under the writ (*n*). And now a court of law would itself restrain or stay the execution against the wife's property.

(4.) Injunction on a creditor's action for administration.

4. Another class of cases in which injunctions were granted against proceedings at law was where there had already been a decree upon a creditor's bill for the

(*k*) *Crosse v. Smith*, 7 East, 258; *Croft v. Lyndsey*, Freem. Ch. 1.

(*l*) And see *Job v. Job*, 26 W. R. 206; L. R. 6 Ch. Div. 562; *Mayer v. Murray*, 8 Ch. Div. 424.

(*m*) 4 My. & Cr. 408.

(*n*) *Langton v. Horton*, 3 Beav. 464; *Pyke v. Northwood*, 1 Beav. 152.

administration of assets. Such a decree was considered in equity to be in the nature of a judgment for all the creditors; and, therefore, if subsequently to it a bond creditor should sue at law, the court of equity in which the decree was made would, in the assertion of its jurisdiction, restrain him from proceeding in his suit (*o*). And now the court of law would stay the action, and probably direct it to be transferred to the Chancery Division (*p*).

5 A party would not be permitted to sue for the same thing and for the same purpose in equity as well as in another court, but would be put to his election to sue in one or the other (*q*). The only exception to this general rule was the case of a mortgagee, who might pursue all his remedies, whether at law or in equity, concurrently (*r*); but in all cases, even in the exceptional case of a mortgagee, the actions would probably now be brought on together in some manner or other.

(5.) A party cannot bring several suits for one and the same purpose.

6 Courts of equity would grant an injunction to protect their own officers, who executed their processes, against any suits brought against them for acts done under or in virtue of such processes. The ground of this assertion of the jurisdiction was, that courts of equity would not suffer their processes to be examined by any other courts. If the processes were irregular, it was the duty of the courts of equity themselves to apply the proper remedy (*s*). And courts of law would always do the like; so that as regards this matter, law

(6.) Equity protected its own officers, who executed the processes of the court.

(*o*) *Morrice v. Bank of England*, Cas. t. Talb. 217; *Perry v. Phelps*, 10 Ves. 38, 39; *Burles v. Popplewell*, 10 Sim. 383.

(*p*) Disting. *Crowle v. Russell*, 4 C. P. Div. 186; and see *In re Boyse*, *Crofton v. Crofton*, 15 Ch. Div. 591.

(*q*) *Vaughan v. Welsh*, Moa. 210; *Gedge v. Montrose*, 5 W. R. 537.

(*r*) See *Palmer v. Hendrie*, 27 Beav. 349; *Schoole v. Sall*, 1 S. & L. 176.

(*s*) *May v. Hook*, cited 2 Dick. 619; *Walker v. Micklethwait*, 1 Dr. & Sm. 49; *Re James Campbell*, 3 De G. M. & G. 585.

and equity already agreed before the Judicature Acts were passed.

In what cases equity would not stay proceedings at law.

(1.) In criminal matters, or in matters not purely civil.

There were, however, cases in which courts of equity would not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they would not interfere to stay proceedings in any criminal matters, or in cases not strictly of a civil nature; as, for instance, on an indictment, or a mandamus, or a criminal information. But this restriction applied, of course, only to cases where the parties seeking redress by such proceedings were not also the plaintiffs in equity; for if they were, the court possessed power to restrain them personally from proceeding at the same time upon the same matter of right in both a civil suit and a criminal prosecution (*t*). Regarding actions of libel, the court of equity would not usually restrain them; they were, in fact, actions exclusively appropriate to the courts of common law, where a jury could be had (*u*).

(2.) Where the ground of defence was equally available at law, and had not been taken or maintained there.

A court of equity had no jurisdiction to relieve a plaintiff against a judgment at law where the case in equity rested upon a ground equally available at law and in equity, unless the plaintiff could establish some special equitable ground for relief (*v*). And after equitable defences could be pleaded at common law under the Common Law Procedure Act, 1854, still less would equity give relief (*w*). It was no ground for equitable interference that a party had not effec-

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(*t*) *Holderstaffe v. Saunders*, 6 Mod. 16; *Montague v. Dudman*, 2 Ves. Sr. 396; *Mayor of York v. Pilkington*, 2 Atk. 302; St. 893; and see especially *Hedley v. Bates*, 13 Ch. Div. 498; *Great Western Rail. Co. v. W. & L. Ry. Co.*, 17 Ch. Div. 493; and disting. *Stannard v. Vestry of St. Giles's, Camberwell*, 20 Ch. Div. 190.

(*u*) *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. App. 142; but see *Thorley's Cattle Food Co. v. Massam*, L. R. 6 Ch. Div. 582; and *Hinrichs v. Berndes*, W. N. 1878, p. 11.

(*v*) *Harrison v. Nettleship*, 2 My. & K. 423.

(*w*) *Farebrother v. Welchman*, 3 Drew. 122.

tually availed himself of a defence at law, or that a court of law had erroneously decided a point of pure law (x).

"It is not sufficient," says Lord Redesdale, "to show that injustice has been done, but that it has been done under circumstances that authorise the court to interfere. Because if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. The inattention of the parties in a court of law can scarcely be made a subject for the interference of a court of equity. There may be cases cognisable at law, and also in equity, and of which cognisance cannot be effectually taken at law; and, therefore, equity does sometimes interfere, as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has had an unconscientious advantage at law, which equity will either put out of the way or restrain him from using. But without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has been already discussed in a court of law, a matter capable of being discussed there, and over which a court of law had full jurisdiction" (y).

As a rule, a matter duly adjudicated on by a common law court cannot be reopened in equity.

Of course, in all such cases, the proper course is to appeal.

By the Common Law Procedure Act, 1854 (z), the

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(x) *Simpson v. Howden*, 3 My. & Cr. 108; *Protheroe v. Forman*, 2 Swanst. 227, 233; *Ware v. Horwood*, 14 Ves. 31.

(y) *Bateman v. Willoc*, 1 Sch. & Lef. 204, 205; *Leitch v. Leitch*, 11 Gr. 81.

(z) 17 & 18 Vict., c. 125, s. 83.

Equitable defences allowed at common law.

courts of common law obtained power to receive pleas of defence on equitable grounds. The equitable plea, however, was only admissible in such cases as, having regard to the machinery of the courts of law and the forms of proceedings therein, complete justice could thereby be done between the parties. In all other cases, therefore, where the defendant would have been

But only in cases in which courts of equity would grant an unconditional and perpetual injunction.

only entitled to such a modified relief as could not properly be dealt with by a court of law, he would still have had to resort to a court of equity. In *Jeffs v. Day* (a), Blackburn, J., says: "Under the Common Law Procedure Act, 1854, we have jurisdiction to entertain equitable defences; but we can only allow such pleas to be pleaded as, if proved, would be a simple bar to the action, and would entitle the defendant to the common law judgment, 'that the plaintiff take nothing by his writ, and that the defendant go thereof without day,' *which would in effect be equivalent to a perpetual injunction in a court of equity.*"

Defendant could not be compelled to plead an equitable defence at law.

Although there was an equitable defence at law, the defendant could not be compelled to plead such equitable defence, but might at once come into equity for an injunction to restrain the action. The Common Law Procedure Act was only permissive. To say that where a man had a good equitable defence, he must proceed at law, and plead that equitable defence, would have been in effect to make imperative that which the Legislature had made optional (b). But since the Judicature Acts, this option is in effect taken away; and the defendant at law may now plead equitable defences of every kind and degree of weight, and he *must*, in fact, do so if he would avail himself of them at all. He certainly cannot now come into equity to restrain the action on any such grounds. And when there has

(a) L. R. 1 Q. B. 374.

(b) *Gomperts v. Pooley*, 4 Drew. 453; *Kingsford v. Swinsford*, 28 L. Ch. 413.

been an agreement to refer to arbitration, an order staying the action may now be made in a proper case (c).

II. Injunctions to restrain wrongful acts unconnected with judicial proceedings.

II. Injunctions against wrongful acts of a special nature. Two classes.

The equitable jurisdiction under this head may be divided into two classes :—

1. Injunctions to enforce a contract (express or implied) or to forbid a breach thereof.

2. Injunctions to prevent a tort, that is, a wrong independent of contract.

1. With reference to injunctions to enforce a contract or to forbid a violation of its terms, the jurisdiction of equity may be said to be co-extensive with its power to compel specific performance. Whatever duty a court of equity will compel a party to perform, it will generally, on the other hand, restrain him from neglecting to perform (d). And in many cases where, from the nature of the subject-matter, the court does not decree specific performance, on the ground of its inability to carry such a decree into effect, it will grant an injunction to restrain the doing of an act contrary to the tenor of the contract; and in effect, though indirectly, it compels thereby a specific performance of the contract. Thus in the case of *Catt v. Tourle* (e), the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted that he should have the exclusive right of supplying beer to any public-house erected on the land so sold.

1. Injunction in cases of contract.

Supplemental to the jurisdiction to compel specific performance.

(c) *Law v. Garrett*, 8 Ch. Div. 26; and distinguish *Mulkern v. Lord*, 4 App. Ca. 182.

(d) Drew on Injunctions, 250.

(e) L. R. 4 Ch. 654; and see *Cooke v. Chilcott*, L. R. 3 Ch. Div. 694; *Luker v. Dennis*, L. R. 7 Ch. Div. 227; and distinguish *Master v. Hansard*, L. R. 4 Ch. Div. 718; *Renals v. Cowlishaw*, 9 Ch. Div. 125; *Hislop v. Leckie*, 6 App. Ca. 560.

The defendant, a member of the society, who was also a brewer, acquired a portion of the land, *with notice of the covenant*, and erected on it a public-house, which he supplied with his own beer. On a bill filed to restrain the defendant from supplying beer, the court held that the covenant, though in terms positive, was in substance negative, and granted an injunction accordingly (*f*).

Injunction a mode of specific performance of negative agreements.

It is evident that where a contract is not to do a thing, which contract is capable of being enforced in equity, it may be, and naturally is, enforced by the court by means of an injunction restraining the doing of that act (*g*). Therefore, where an agreement was entered into between the plaintiffs (who resided very near the church of Hammersmith), of the one part, and the parson, churchwardens, overseers, and certain inhabitants of the parish of the other part, by which the plaintiffs covenanted to erect a new cupola, clock, and bell to the church; and the parties of the second part covenanted that a bell which had been daily rung at five o'clock in the morning, to the great annoyance of the plaintiffs, should not be rung at that hour during the lives of the plaintiffs, or the survivors of them; the plaintiffs performed their part of the agreement, but the bell, after two years, was rung again; the agreement was specifically enforced against the parish authorities by means of an injunction against ringing the bell in breach of the agreement (*h*).

Court of equity may restrain the

It seems to be now settled that the inability of equity to compel the specific performance of one part

(*f*) And see *Edwick v. Hawkes*, 18 Ch. Div. 199; also *Werderman v. Société Générale d'Electricité*, 19 Ch. Div. 246; *Nicoll v. Fenning*, 19 Ch. Div. 259; *L. and S. W. Railway Co. v. Gomm*, 20 Ch. Div. 560.

(*g*) *Lumley v. Wagner*, 1 De G. M. & G. 615; and see *Gaskin v. Balls*, 13 Ch. Div. 324.

(*h*) *Martin v. Nutkin*, 2 P. Wms. 266; *Barrett v. Blagrove*, 5 Ves. 555; *S. C.* 6 Ves. 104; *Fry on Spec. Perf.* 329; *Broder v. Saillard*, L. R. 2 Ch. Div. 692; *Richards v. Revitt*, L. R. 7 Ch. Div. 224.

of an agreement, is not *per se* a ground for its refusing to enjoin against the breach of another part of the same agreement. Thus, in *Lumley v. Wagner* (i), J. W. agreed with W. L. that she would sing at B. L.'s theatre during a certain period of time, and would not sing elsewhere without his written authority. The court granted an injunction against J. W. singing at a rival theatre. The Lord Chancellor said: "The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff, and the other by the defendant, . . . but of an act to be done by J. W. alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant, the one being ancillary to, concurrent and operating together with, the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract; it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre."

"It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant, J. W., from any other theatre, while the court had no power to compel her to perform at Her Majesty's Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her

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(i) 1 De G. M. & G. 616.



engagement. The jurisdiction which I now exercise is wholly within the power of the court; and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce" (*j*).

No specific performance where court cannot secure performance by the plaintiff.

But where the terms of a contract are such that the court cannot superintend so as to secure the performance by a plaintiff on his part, it will not decree specific performance; and if, on non-performance by a plaintiff, both parties cannot have equal justice, it will not, in the absence of an express negative covenant, and where the contract cannot be split into two separate and independent portions, and the negative part enforced, grant an injunction to restrain acts the doing of which is inconsistent with the maintenance of the contract (*k*).

Injunction, although the contract is implied only.

It is not only in the case of express contracts of the kinds above illustrated that equity interposes by injunction to restrain conduct contrary to their tenor, but also in implied contracts resulting from the acts or representations of the parties.

If a representation is made inducing another to do an act, equity restrains the contrary.

Thus, it is a very old head of equity jurisdiction, that if a person makes a representation to another as an inducement to him to act, and he thereupon acts upon the faith of that representation, the former shall make it good. *A.*, the lessee of a building lease, in which there was a covenant to erect houses on three plots of land in a specified manner, sold one of the houses to *B.*, the plaintiff's predecessor in title, to whom he represented that he was restricted from building, so as to obstruct the sea view. *A.*, in the

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(*j*) *Montague v. Flockton*, L. R. 16 Eq. 189; but see *Wolverhampton Railway v. London and North-Western Railway*, L. R. 16 Eq. 440; *Fothergill v. Rowland*, L. R. 17 Eq. 141.

(*k*) *Joyce on Injunctions*, 204; *Peto v. Brighton, Uckfield, and Tunbridge Wells Railway Company*, 11 W. R. 874.

sub-lease granted to B., covenanted to observe the lessee's covenants in the original lease, but subsequently surrendered the old lease to his lessor, and a new lease without the restrictive covenant was granted to him in lieu thereof; and A. commenced building, contrary to the original covenant. Upon a bill filed by the plaintiff, it was held that he was entitled to an injunction (*l*); *scil.* because, *semble*, the surrender was subject to the plaintiff's acquired rights (*m*).

It has upon similar principles been held that where a person claiming a title in himself is privy to the fact that another party is dealing with the property as his own, he will be restrained from asserting his own title against a title created by such other person, although he derives no benefit from the transaction (*n*). And the same doctrine is applicable where a person having a title to an estate stands by and suffers a person ignorant of it to expend money upon the estate. In such cases, the person who has so expended money will, in equity, be indemnified for his expenditure on eviction by the real owner, for it would be inequitable for him to profit by his own fraud (*o*).

A party claiming a title in himself, and standing by while another deals with the property as his own, restrained.

2. Injunctions to prevent a tort, *i.e.*, a wrong independent of contract. 2. Injunctions against torts.

It may be laid down as a general rule, that wherever a right exists or is created, a violation of that right will be prohibited, subject to the limitation that the right is cognisable by law. It follows, therefore, that the restraining process of equity will apply to the whole range of rights and duties which are recognised as enforceable at law. But it should also be

Wherever there is a right, there is a remedy for its breach, if the right be cognisable by a court of justice.

(*l*) *Piggott v. Stratton*, 1 De G. F. & Jo. 33; *Slim v. Croucher*, 1 De G. F. & Jo. 518.

(*m*) *Smalley v. Hardinge*, 7 Q. B. Div. 524.

(*n*) *Nicholson v. Hooper*, 4 My. & Cr. 186.

(*o*) *Neesom v. Clarkson*, 4 Hare, 97; *Dann v. Spurrier*, 7 Ves. 235.

remembered that though the jurisdiction of equity is in principle so extensive, it is restrained and modified by considerations of expediency and convenience; and that equity will not interfere where the breach of a duty or the violation of a right may be completely and adequately paid for by damages at law, or where other reasons of justice and convenience are against the intervention of equity. It is proposed now to consider a few of the more important and representative cases in which equity interferes by injunction to restrain breaches of duty or violations of right.

1. Jurisdiction  
in cases of  
waste.

1. In cases of waste.

Waste may be defined as a material (and usually, but not necessarily, destructive) alteration of things forming an integral part of the inheritance (*p*).

Arose from  
incompetency  
of common  
law.  
Common law  
powers over  
waste.

The original jurisdiction of equity to restrain waste arose from the incompleteness (originally) of the common law remedy, the nature of which with regard to waste may be thus shortly stated. By the Statutes of Marlebridge (*q*), Gloucester (*r*), and Westminster (*s*), a writ of waste might be brought by him who had the immediate estate of inheritance in reversion or remainder against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years; also by one tenant in common or joint-tenant against another; but the writ did not lie between *co-parceners* (*t*); and in many other cases also the courts of law had no *effective* jurisdiction in waste.

In what cases  
equity inter-  
fered.

Courts of equity, on the other hand, by no means limited themselves to the cases provided for by statute, but extended their jurisdiction to cases where the

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(*p*) Tudor's Real Property Cases, 90.

(*q*) 52 Hen. III.

(*r*) 6 Edw. I., c. 5.

(*s*) 13 Edw. I., c. 22.

(*t*) 3 Black Com. 227, 228; *Jefferson v. Bishop of Durham*, 1 Bos. & Pull. 120.

common law remedies were inapplicable, *e.g.*, to cases where the titles of the parties were of a purely equitable nature; and to cases of equitable waste (*u*), *i.e.*, acts which were deemed waste only in courts of equity; and to cases where no waste had been actually committed, but was only meditated or apprehended; the jurisdiction in the last group of cases being founded upon the principle of *Quia timet* (*v*).

For example, where there was a tenant for life, remainder for life, remainder in fee, the tenant for life would be restrained by injunction from committing waste; although, if he did commit waste, no action of waste would have lain against him at law by the remainder-man for life, for he had not the inheritance; nor by the remainder-man in fee, by reason of the interposed remainder for life (*w*). *but as he had not the inheritance*

Cases where a person was punishable at law.

So also where a person was tenant for life without impeachment of waste, he might of course, according to his legal right, fell timber, open new mines, and have full property in the produce (*x*); but if, in exercising that right, he was guilty of malicious, extravagant, or capricious waste, such as pulling down and dismantling a mansion-house (*y*), or felling timber planted or left standing for the ornament or shelter of a mansion-house or grounds (*z*), he would have been restrained in equity. And the same rule applied to a tenant in tail after possibility of issue extinct, who had the same legal right to commit waste as a tenant for life without impeachment of waste (*a*).

As where a tenant for life abused his legal right to commit waste.

Tenant in tail after possibility of issue extinct.

(u) *Downshire v. Sandys*, 6 Ves. 109, 110; but see now 36 & 37 Vict., c. 66, s. 25, § 3. (v) St. 912.

(w) *Garth v. Cotton*, 1 Ves. Sr. 524, 555, s. c.; 1 L. C. 751.

(x) Co. Litt. 220 a; *Lewis Bowles's Case*, 11 Co. 79 b.

(y) *Vane v. Barnard*, 2 Vern. 738.

(z) *Rolt v. Somerville*, 2 Eq. Ca. Abr. 759; *Morris v. Morris*, 15 Sim. 505; *Micklethwaite v. Micklethwaite*, 1 De G. & Jo. 519.

(a) *Att.-Gen. v. Duke of Marlborough*, 3 Mad. 538; *Abrahall v. Bubb*, 2 Swanst. 172.

Cases where the aggrieved party has purely an equitable title.

Also in cases where the aggrieved party has a purely equitable right; for instance, in the case of mortgages, if the mortgagor in possession should fell timber on the estate, and thereby the security would become insufficient, but not otherwise, a court of equity would have restrained the mortgagor by injunction (b); and conversely a mortgagee in possession would not have been permitted to waste the estate, unless the security was insufficient, although in the latter case the court would not have restrained him from selling timber, the produce being, of course, applied in ease of the estate (c).

Permissive waste not remediable in equity.

On the other hand, it seems that courts of equity had no jurisdiction in cases of permissive waste by a legal tenant for life (d), that is, for not doing repairs, whereby houses were suffered to fall into decay (e); and no injunction would have been granted to stay ameliorative waste (f).

Waste under the Judicature Act, 1873.

Under the Judicature Act, 1873, the jurisdiction of the Chancery Division in all these cases substantially remains, notwithstanding that by that Act (g) the distinction between legal and equitable waste is in effect abolished, and the Queen's Bench Division may now give damages, and even an injunction, in the case of equitable waste.

## 2. Nuisances.

Public nuisances abated by indictment, but sometimes also by an injunction on information filed.

## 2. In cases of nuisances.

In cases of public nuisances, properly so called, an indictment or a criminal information lay and lies to punish the offenders; but a civil information also lay and lies in equity to redress the grievance by way of

(b) *Robinson v. Litton*, 3 Atk. 209; *King v. Smith*, 2 Hare, 239; *Russ v. Mills*, 7 Gr. 145.

(c) *Withrington v. Banks*, Sel. Ch. Ca. 31.

(d) *Powys v. Blagrave*, Kay, 495; 4 De G. M. & G. 448.

(e) Inst. 145.

(f) *Doherty v. Allman*, 3 App. Ca. 709.

(g) Sect. 25, sub-sect. 3.

injunction, *e.g.*, against a public nuisance occasioned by stopping up a highway (*h*). And, as a general rule, a suit of this nature was and is instituted by the Attorney-General, or he is made a party, as representing the public. But when a private person suffers a special and peculiar injury distinct from that of the public in general, in consequence of the public nuisance, he will be entitled individually to an injunction in equity, and in such a case the Attorney-General is not a necessary (although a usual) party to the action (*i*). Public nuisance causing special damage,—ground for a merely civil action.

In regard to private nuisances, the interference of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing vexatious and interminable litigation, or of preventing multiplicity of suits. It is not, however, every nuisance that will justify the interposition of a court of equity; for there must in general be such an injury as from its nature is not susceptible of being adequately compensated in damages at law, or such as, from its continuance and permanently or increasingly mischievous character, must occasion a constantly recurring grievance (*j*). Thus a mere common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary; on the other hand, if it is continued so as to become a nuisance, or if there is a claim of right to do it, that is a sufficient ground for an injunction (*k*). So a mere fanciful diminution of the value of property by a nuisance, without irreparable mischief, and without any claim of right to do the act, will not furnish any foundation for an injunction (*l*). Equity has jurisdiction in cases of private nuisances,—in a merely civil action.

(*h*) *Att.-Gen. v. Cleaver*, 18 Ves. 217; *Ripon v. Hobart*, 3 My. & K. 169, 179.

(*i*) *Wood v. Sutcliffe*, 2 Sim. N. S. 163; and see *Vernon v. Vestry of St. James's, Westminster*, 16 Ch. Div. 449.

(*j*) *Fishmongers' Co. v. East India Co.*, 1 Dick. 163.

(*k*) *Pennington v. Brinsop Hall Coal Co.*, L. R. 5 Ch. Div. 769; and see *Goodson v. Richardson*, L. R. 9 Ch. App. 221.

(*l*) *Att.-Gen. v. Nicholl*, 16 Ves. 342; and see *Sturges v. Bridgeman*, 11 Ch. Div. 852; *Cooper v. Crabtree*, 20 Ch. Div. 589.

Where injury  
is irreparable.

But where the injury is irreparable, as where loss of health (*m*), loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act, in every such case courts of equity will interfere by injunction (*n*). Thus, for example, where a party builds so near the house of another party as to darken his windows, against the clear right of the latter, either by contract or by ancient possession, courts of equity will interfere by injunction to prevent the nuisance, as well as to remedy it, if already recently completed; for the continuance of the nuisance in such a case would furnish no substantial compensation (*o*), and this reason is much stronger in the case of the pollution of streams (*p*).

Darkening  
ancient lights.

Rights to lateral  
support of  
soil.

Also a landowner having a right, independently of prescription, to the lateral support of his neighbour's land, so far as that support is necessary to sustain the soil of his own land in its natural state, and after twenty years' enjoyment, the right to lateral support for the buildings also erected on the land (*q*), an injunction will issue in maintenance of his rights.

Of soil with  
buildings on  
it.

Pollution of  
streams.

So equity will interfere to prevent the pollution of streams, causing injury to the riparian owners. In *Att.-Gen. v. Borough of Birmingham* (*r*), Wood, V.C., thus expresses himself: "Now the plaintiff's rights are these: he has a clear right to enjoy the river, which, before the defendant's operations, flowed unpolluted—or, at all events, so far unpolluted that fish could live

(*m*) *Walter v. Selfe*, 20 L. J. Ch. 433.

(*n*) *Wynstanley v. Lee*, 2 Swanst. 335; *Broadbent v. Imp. Gas Co.*, 7 De G. M. & G. 436; and see *Ecclesiastical Commissioners v. Kino*, 14 Ch. Div. 213; *Cooper v. Crabtree*, 19 Ch. Div. 193; 20 Ch. Div. 567.

(*o*) *Att.-Gen. v. Nichol*, 16 Ves. 338; *Wynstanley v. Lee*, 2 Swanst. 335; *Theed v. Debenham*, L. R. 2 Ch. Div. 165; *N. P. Insurance Co. v. P. Assurance Co.*, L. R. 6 Ch. Div. 757; *Aynsley v. Glover*, L. R. 10 Ch. App. 283; *Leech v. Schweder*, L. R. 9 Ch. App. 463.

(*p*) *Pennington v. Brinsop Hall Coal Co.*, *supra*.

(*q*) *Hunt v. Peake*, Johns. 705.

(*r*) 4 K. & J. 546.

in the stream, and cattle would drink of it—through his grounds, for three miles and upwards, in exactly the same condition in which it flowed formerly, so that cattle may drink of it without injury, and fish, which were accustomed to frequent it, may not be driven elsewhere. . . . As regards the discretion the court should exercise where such a right exists, if the plaintiff finds the river so polluted as to be a continuous injury to him; if, in order to assert his right, he would be obliged to bring a series of actions, one every day of his life, in respect of every additional injury to his cattle, or every additional annoyance to himself (not to mention the permanent injury which he would sustain in having the water—which, as it passes along the course of his land, is his property—so damaged that he cannot use it), then the court will properly exercise its discretion by granting an injunction to relieve him from the necessity of bringing a series of actions, in order to obtain the damages to which such continual and daily annoyance entitles him.”

This interference of equity to prevent the pollution of streams is available also for preventing the further pollution of a stream that is already comparatively polluted (*s*), such further pollution being, of course, sensible, and not merely fanciful. Further pollution of streams.

### 3. Cases of patents, copyright, and trade-marks.

It is in order to prevent irreparable mischief, or to suppress multiplicity of suits and vexatious litigation, that courts of equity interfere in cases of patents for inventions, and in cases of trade-marks, and in cases of copyrights to secure the rights of the inventor or author; for it is plain that if no other remedy could

(3.) Patents, copyright, and trade-marks.

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(*s*) See *Pennington v. Brinsop Hall Coal Co.*, L. R. 5 Ch. Div. 769; *Crosley v. Lightowler*, L. R. 3 Eq. 279, and S. C. on appeal, L. R. 2 Ch. App. 478; and distinguish *Baxendale v. M'Murray*, L. R. 2 Ch. App. 790; and *Att.-Gen. v. Dorking Union*, 20 Ch. Div. 595.



Jurisdiction,  
when exer-  
cised.

be given in cases of patents, trade-marks, and copy-right than an action at law for damages, the inventor or author might be ruined by the perpetual litigation, without ever being able to have a final establishment of his rights; and besides, the mere damages recoverable in an action would be (in the general case) a very inadequate compensation (*t*). And, therefore, the jurisdiction will be exercised in all cases where there is a clear colour of title, founded upon long possession of the right; and even an equitable interest or an interest limited in point of time or of extent, is sufficient; but a mere agent to sell has not such an interest as will entitle him to maintain the action (*u*).

(A.) Patents.  
Injunction is  
not a matter  
of course; de-  
pends on cir-  
cumstances.  
Has validity  
of patent been  
established?

(A.) In the case of a patent, if the patent has been but recently granted, and its validity has not been ascertained by a trial at law or otherwise established, the court will not generally grant an immediate injunction, but will require the validity of the patent, if denied or put in doubt (*v*), to be first ascertained or established; on the other hand, if the patent has been granted for some length of time, and the patentee has put the invention into public use, and has had an exclusive possession under his patent for a period of time, which might fairly create the presumption of an exclusive right, the court will ordinarily interfere at once by way of injunction; and in all cases the court will now determine for itself, or procure to be determined by a jury, the preliminary question of the validity of the patent.

Has it been in  
existence for  
a long time?

Three courses  
open to the  
court upon an  
interlocutory

In a patent case, upon motion for an interlocutory injunction, several courses are open to the court, namely,—(1.) The court may at once grant the in-

(*t*) *Hogg v. Kirby*, 8 Ves. 223.

(*u*) *Nicol v. Stockdale*, 3 Swanst. 687.

(*v*) *Martin v. Wright*, 6 Sim. 297; *Saunders v. Smith*, 3 My. & Cr. 711, 728.

junction *simpliciter*, without more, but never does so where the defendant disputes the validity of the plaintiff's patent; or (2.) the court may follow the more usual practice of either granting an interim injunction, and at the same time requiring the plaintiff to give an undertaking as to damages, or of withholding the injunction until the trial, the defendant in the meantime keeping an account (*w*).

application :  
(a.) Injunction *simpliciter*.  
(b.) Interim injunction, plaintiff undertaking as to damages.  
(c.) Injunction directed to stand over until trial, defendant keeping an account.

(B.) In cases of copyright, the plaintiff must also in the first place make out his title to the copyright, by registration and otherwise; also he can have no copyright in any work of a clearly irreligious, immoral, libellous, or obscene description or tendency (*x*); but, subject to these qualifications, there may be copyright not only in books, but also in music, engraving, sculpture, painting, photography, and generally in all ornamental or useful designs.

(B.) Copyright. No copyright in irreligious, immoral, or libellous works.

In cases of copyright, the action is usually brought for an alleged infringement of the copyright, and claims an injunction, and either damages or an account of profits; and in these actions, assuming that the right to the copyright exists, the principal question at the trial is whether there has been in fact an infringement. Now it is clearly settled not to be an infringement of the copyright in a book to make *bond fide* quotations or extracts from it, or to make a *bond fide* abridgment of it, or to make a *bond fide* use of the same common materials in the composition of another work. But what constitutes a *bond fide* use of extracts or a *bond fide* abridgment or a *bond fide* use of common materials is often a matter of most embarrassing inquiry; the question being whether there has been a legitimate

What is an infringement of copyright.

*Bond fide* quotations, a *bond fide* abridgment, or *bond fide* use of common materials, not an infringement.

(*w*) *Bacon v. Jones*, 4 My. & Cr. 433, 436,—adapted to suit the modern practice; see *Plimpton v. Spiller*, L. R. 4 Ch. Div. 286; and see Goodeve's Abstract of Patent Cases, p. 12.

(*x*) *Copinger on Copyright*, 48; and see *Lawrence v. Smith*, Jac. 472; *Walcot v. Walker*, 7 Ves. 1.

and fair exercise of mental ability, industry, and discrimination resulting in the production of a new work (y). Therefore, if, instead of searching into the common sources in an independent and critical manner, and deriving therefrom the materials which he chooses to appropriate, he should quietly and servilely avail himself of the labour of his predecessor, and adopt his arrangement, or do it with only colourable variations, that would not be a *bond fide* use of the common materials, but would be an infringement. But, subject always to his complying with the above distinctions, it is no infringement where an author has been led by an earlier writer to consult authorities referred to by him, even though he may quote the same passages from those authorities which were used by the earlier writer (z). Neither is it an infringement if nothing material is taken (a).

Identical quotations,—  
even when  
suggested by  
earlier writers.

Maps, calendars,  
tables, &c.

As regards copyright in maps, road-books, calendars, chronological and other tables, the materials being equally open to all, and the result also necessarily showing a certain identity or similitude, there is a difficulty not only in distinguishing the difference in the result, but also in detecting any unfair use of a prior existing copyright. Suppose, for instance, the case of maps; one man may publish the map of a country; another man with the same design, if he has equal skill and opportunity, may by his own labour produce almost a facsimile; and the fact of copy or no copy has generally to be ascertained by the *appearance in the alleged copy of the same inaccuracies or blunders (if any) that are to be found in the first published work*; but even this mode of proof must be applied with caution (b).

(y) *Campbell v. Scott*, 11 Sim. 31; *Lewis v. Fullerton*, 2 Beav. 6.

(z) *Pike v. Nicholas*, L. R. 5 Ch. 251.

(a) *Chatterton v. Cave*, 3 App. Ca. 483.

(b) *Wilkins v. Aikin*, 17 Ves. 424; *Longman v. Winchester*, 16 Ves. 269; and see *Lucas v. Cooke*, 13 Ch. Div. 872; and *Dicks v. Brooks*, 15 Ch. Div. 52.

In *Abernethy v. Hutchinson* (c), it was held that persons admitted as pupils or otherwise to hear lectures orally delivered cannot publish those lectures for profit; consequently, any such person, and also every other person to whom he might communicate them, would be restrained; also, copyright in lectures is now, under certain conditions, protected by legislative enactment (d).

✓ There may be a valid copyright in the mere title to a book, e.g., in the title "Trial and Friendship" (e); but this has been recently questioned (f). There may also be copyright in the mere external appearance of a newspaper, e.g., *The Times* (g).

As to private letters, whether on literary subjects or on matters of private business, personal friendships, or family concerns, a learned writer lays down the following conclusions (h):—

1. That the writer of private letters has such a qualified right of property in them as will entitle him to an injunction to restrain their publication by the party written to, or his assignees (i).

2. That the party written to has such a qualified right of property in the letters written to him as will entitle him or his personal representative to restrain the publication of them by a stranger (j).

3. That such qualified right may be displaced

(c) 1 H. & Tw. 40; s. c. 3 L. J. Ch. 209. (d) 5 & 6 Will. IV., c. 65.  
 (e) *Weldon v. Dick*, 10 Ch. Div. 247.  
 (f) *Dicks v. Yates*, 18 Ch. Div. 76.  
 (g) *Walter v. Howe*, 17 Ch. Div. 708.  
 (h) Drew. on Inj. 208, 209; and see Copinger on Copyright, 2d ed., pp. 43-53.  
 (i) *Pope v. Curl*, 2 Atk. 342; *Gee v. Pritchard*, 2 Swanst. 402.  
 (j) *Granard v. Dunkin*, 1 Ball. & Beat. 207; *Thompson v. Stanhope*, Amb. 737.

Copyright in lectures.

Copyright in title of book.

Copyright in letters on literary subjects or private matters.

1. The writer may restrain their publication.

2. The party written to may also restrain their publication by a stranger.

3. Publication permitted on

monopoly, such a privilege, as to prevent any man from making essence of anchovies, and selling it under his own name" (r).

*Cocks v. Chandler*,—  
use of word  
"Original"  
a fraud on  
public.

In *Cocks v. Chandler* (s), the bill was filed by the successor in title of the inventor of a sauce known as "Reading Sauce," to restrain a rival manufacturer from selling his preparation under the name of "The Original Reading Sauce;" and on proof by the plaintiff that he alone was entitled to the original receipt, and that on that ground his sauce had attained a high reputation in the market, an injunction was granted against the use by the defendant of the word "original," as being a device to mislead the public (t).

Cairns's and  
Rolt's Acts,—  
objects of.

Before leaving this branch of the concurrent jurisdiction of the Court of Chancery, it is appropriate briefly to mention certain legislative enactments which (prior to the Judicature Acts, 1873-75) had to a considerable extent increased the power and usefulness of the Court of Chancery, by conferring on it powers theretofore exclusively belonging to the courts of common law.

Lord Cairns's  
Act,—  
Equity may  
give damages  
where it has a  
jurisdiction to  
grant injunction  
or specific  
performance.

Firstly, by Lord Cairns's Act (u), it was enacted that *in all cases in which the court had jurisdiction* to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, in all these cases it should be lawful for the same court, if it should think fit, to

(r) See also *Christie v. Christie*, W. N. 1875, p. 3; *Cope v. Evans*, L. R. 18 Eq. 138; *Massam v. Thorley's Cattle Food Co.*, 14 Ch. Div. 748.

(s) L. R. 11 Eq. 446; *Marshall v. Ross*, L. R. 8 Eq. 651; *Crawford v. Shuttock*, 13 Gr. 149; *Davis v. Kennedy*, 13 Gr. 523.

(t) See also *Raggett v. Findlater*, L. R. 17 Eq. 29; *Cheavin v. Walker*, L. R. 5 Ch. Div. 850; *Sieyert v. Findlater*, 7 Ch. Div. 801; *Braham v. Brackin*, 7 Ch. Div. 848.

(u) 21 & 22 Vict., c. 27.

award damages to the party injured *either in addition to or in substitution for* such injunction, and such damages might be assessed in such manner as the court should direct. By subsequent sections, provision was made for the assessment of damages, and the trial of questions of fact, either by a jury before the court itself, or by the court alone, or for the assessment of damages by a jury before any judge of one of the superior courts of common law, at *nisi prius*, or at the assizes, or before a sheriff, as is done in writs of inquiry at common law (*v*).

May assess damages with or without a jury, or direct an issue.

Upon this statute the following points were settled:—

Construction and effect of the Act.

1. That the statute did not extend "the jurisdiction of the court to cases where there was a plain common law remedy, and where, before the statute, the court would not have interfered" (*w*).

1. Equity jurisdiction not extended where there was a plain common law remedy.

2. "Where a plaintiff came to the court for the specific performance of a contract which could not be performed at all, there damages could not be given in lieu of specific performance" (*x*).

2. Damages not given where the contract could not be performed at all.

3. So, again, there could be no relief in a court of equity "where a bill was filed for damages, and damages only" (*y*).

3. No relief where damages only were asked for.

4. But though, as a general rule, damages would be awarded only as incidental to granting specific performance or an injunction, yet damages might be given

4. Damages when injunction not granted.

(*v*) 21 & 22 Vict., c. 27, ss. 2-6; and see *Jaques v. Millar*, L. R. 6 Ch. Div. 153.

(*w*) *Wicks v. Hunt*, Johnson, 380.

(*x*) Per Wood, V.C., in *Middleton v. Magnay*, 2 H. & M. 236; *Rogers v. Challis*, 27 Beav. 175; *Scott v. Rayment*, L. R. 7 Eq. 112.

(*y*) *Middleton v. Magnay*, 2 H. & M. 237; *Lewers v. Earl of Shaftesbury*, L. R. 2 Eq. 270.

where the evidence was insufficient to support a case for an injunction (z).

5. Injunction and not damages.

5. But the court could not, in its discretion, give damages in lieu of an injunction where the plaintiff made out his right to an injunction (a).

6. Where court might compel specific performance of one part of an agreement, it might give damages for breach of another part or for the whole.

6. Where a court had jurisdiction to compel specific performance of a *part* of a contract, it had also power under the statute to award damages for the breach of *another part* of that contract, in respect of which it could not have compelled specific performance. Thus in a case where the plaintiff had agreed to grant a lease to defendant when and so soon as he, the defendant, should have built a new house on the land; and the defendant agreed to accept such lease when required, and to pull down an old house then standing on the land, and to build a new one on the site thereof. It was held that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease, Wood, V.C., saying: "The defendant has agreed to accept a lease when required, and the court has therefore jurisdiction. . . . *The court having therefore acquired jurisdiction, may give damages either in addition to or in substitution for specific performance.* The meaning of the statute can only be, that where the court has jurisdiction in the suit, it may award damages in substitution for specific performance" (b).

Sir John Rolt's Act;—determination of legal questions.

Secondly, By Rolt's Act (c) it was enacted, that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought in any Chancery cause or matter, whether the title to

(z) *City of London Brewery Company v. Tennant*, L. R. 9 Ch. 212.

(a) *Krehl v. Burrell*, 7 Ch. Div. 551; 10 Ch. Div. 146.

(b) *Soames v. Edge*, John. 669; *Middleton v. Greenwood*, 2 De G. J. & S. 142.

(c) 25 & 26 Vict. c. 42.

such relief or remedy was or was not incident to, or dependent upon, a legal right, every question of law or fact cognisable in a court of common law on the determination of which the title to such relief or remedy depended, should be determined by or before the same court; or, when more convenient, an issue or issues might be directed to be tried at the assizes; and in all cases subject to the court's being of opinion in a matter of concurrent jurisdiction that the case was properly brought into equity (*d*).

The courts of common law were also (prior to the Judicature Acts) invested with equitable powers, and might have granted an injunction; for by the Common Law Procedure Act, 1854 (*e*), s. 79, it was enacted, that in all cases of breach of contract or other injury, where the party injured was entitled to maintain *and had brought an action*, he might in like case and manner as thereinbefore provided with respect to *mandamus*, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he might, in the same action, include a claim for damages or other redress (*f*).

Injunction at common law.

An action must have been already commenced.

Of course now, under the Judicature Acts, the Chancery Division and the Queen's Bench Division are in all respects upon a level, each having its own original jurisdiction, and also all the original jurisdiction of the other, as regards all matters calling for an injunction, with or without damages or profits.

(*d*) *Durell v. Pritchard*, L. R. 1 Ch. App. 244.

(*e*) 17 & 18 Vict., c. 125.

(*f*) *Mayell v. Highbey*, 31 L. J. Exch. 329; *Jessel v. Chaplin*, 2 Jur. N.S. 931.



## CHAPTER XI.

## PARTITION.

Origin of  
jurisdiction.

THE ground of the equity jurisdiction in partition has been thus stated by Lord Redesdale:—"In the case of partition of an estate, if the titles of the parties are in any degree complicated, the difficulties which have occurred in proceeding at the common law have led to applications to courts of equity for partitions, which are effected by first ascertaining the rights of the several persons interested, and then issuing a commission to make the partition required; and upon return of the commission, and confirmation of that return by the court, the partition is finally completed by mutual conveyances of the allotments made to the several parties" (a).

Writ of partition at law inadequate.

The common law remedy by writ of partition was early found to be inadequate and incomplete, on account of the various and complicated interests which arose in the ownership of real estate, and because the courts of law were incapable of effectuating in fact the partition by mutual conveyances. It was for these reasons, coupled also with the necessity for the discovery of titles and of making all appropriate compensatory adjustments, that the courts of equity assumed a general concurrent jurisdiction with courts of law in all cases of partition; but the courts of equity interfered also in cases where a partition would not have been directed at law; for instance, where an equitable title was set up (b).

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(a) Mitford on Pleading, 120.

(b) *Wills v. Slade*, 6 Ves. 498; *Cartwright v. Pulleney*, 2 Atk. 380.

A suit for partition could not have been and cannot be maintained by a person interested as a joint-tenant or tenant in common in reversion; for it would be unreasonable that a reversioner should disturb the existing state of things during the possession of the tenant for life, or other prior tenant (c); also a partition will not be granted, when there is an overriding power or trust, during the continuance of such power or trust (d). And of course a bill or action for partition will not lie where the purpose of the action is not partition, but to prove the legal title (e).

Cases in which partition not directed.

In suits for partition, difficulties often arise from the incapacity of some of the persons interested in the property. But now, where any decree has been made by the court for a partition, or for a sale in lieu of partition (f), of any lands, the court may declare that any of the parties to the suit are trustees of such lands, or any part thereof, within the meaning of the Trustee Act, 1850; or that the interests of unborn persons who might claim under any party to the suit, or by other ways mentioned in the Act, are the interests of persons who, upon coming into existence, would be trustees within the meaning of the Act; and thereupon the Lord Chancellor, intrusted by the sign manual with the care of the persons and estates of lunatics, may, as to any lunatic or person of unsound mind, or the Chancery Division or any judge thereof may, in other cases, make such orders as to the estates, rights, and interests of such persons, born or unborn, as he or the court might, under the provisions of the Act, make concerning the estates, rights, and interests of trustees

Provisions of Trustee Act, 1850, when persons interested are under incapacity.

(c) *Evans v. Bagshaw*, L. R. 8 Eq. 469; L. R. 5 Ch. 340.

(d) *Swaine v. Denby*, 14 Ch. Div. 326; *Taylor v. Grange*, 13 Ch. Div. 223, and 15 Ch. Div. 165; *Biggs v. Peacock*, 20 Ch. Div. 200.

(e) *Giffard v. Williams*, L. R. 5 Ch. 546; *Slade v. Barlow*, L. R. 7 Eq. 296.

(f) The Partition Act, 1868 (31 & 32 Vict., c. 40), s. 7, amended by the Partition Act, 1876 (39 & 40 Vict., c. 17).

born or unborn (*g*). Accordingly, if any of the persons interested are infants, lunatics, or persons of unsound mind, the court will carry into effect the decree for partition, by making an order vesting their shares in or directing a conveyance of their shares by such persons as the court shall direct (*h*).

Partition, how made.

Formerly a partition was usually made by a commission issued to inspect and apportion the estate among the several persons entitled. Now, however, it is more usually made upon a reference to Chambers, or (but very rarely) by the decree at the hearing.

Difficulties, where property small, of carrying partition into effect.

Where the property is small and the persons interested are many, the difficulties in the way of carrying a partition into effect were often so great as to render the step the reverse of beneficial. The court in one case (*i*) directed the partition of a house, and the commission having been executed, an exception was taken by the defendant on the ground that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard. The Lord Chancellor overruled the exception, saying that he did not know how to make a better partition for them; that he granted the commission with great reluctance, but was bound by authority.

Now remedied by sale under Partition Acts, 1868 and 1876.

These difficulties are now in great measure removed by the Partition Act, 1868, amended by the Partition Act, 1876 (*j*), by which it is provided, that if it appears to the court that, by reason of the nature of the property or of the number of the parties interested or presumptively interested, or of the absence or dis-

(*g*) Trustee Act, 1850 (13 & 14 Vict., c. 60), s. 30.

(*h*) *Ibid.*, ss. 3, 7, 30; Dan. Ch. Pr. 1031.

(*i*) *Turner v. Morgan*, 8 Ves. 143.

(*j*) 39 & 40 Vict., c. 17.

ability of some of the parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial than a partition, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others, direct a sale accordingly (*k*). Also, upon the request of a moiety or upwards of the co-owners, the court is required to direct a sale, unless it sees good cause to the contrary (*l*).

The sale may be directed on motion upon admissions in the pleadings (*m*); and usually all the co-owners (other than the party having the conduct of the sale) have leave to bid (*n*).

Sale,—mode of directing.

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(*k*) 31 & 32 Vict., c. 40, s. 3; Dan. Ch. Pr. 1019–1022. See *Rowe v. Gray*, L. R. 5 Ch. Div. 263; *Wilkinson v. Joberns*, L. R. 16 Eq. 14; *Drinkwater v. Ratcliffe*, L. R. 20 Eq. 528; *Gilbert v. Smith*, 8 Ch. Div. 548; 11 Ch. Div. 78. And see also Gregory Walker's Manual of the Partition Acts, 1868 and 1876.

(*l*) *Porter v. Lopes*, 7 Ch. Div. 358; *Saxton v. Bartley*, W. N. 1879, p. 94.

(*m*) Order xl. rule 11; *Burnell v. Burnell*, 11 Ch. Div. 213.

(*n*) *Verrall v. Cathcart*, W. N. 1879, p. 100.

## CHAPTER XII.

## INTERPLEADER.

Interpleader in equity where two or more persons claim the same thing from a third person.

WHERE two or more persons, whose titles were connected by reason either of one being derived from the other, or of both being derived from a common source, claimed the same thing from a third person, and he, not knowing to which of the claimants he ought of right to render it, feared he might be hurt by one or other of them, he might have exhibited a bill of interpleader against them, stating their several claims and his own position in regard to the matter, and praying that the claimants might interplead, so that the court might adjudge to whom the thing belonged; and if any suits at law had been brought against him, he might also have prayed that the claimants might be restrained from proceeding with those suits or actions till the right was determined (a).

Interpleader at law only in cases of joint bailment.

It is true the remedy of interpleader existed also at the common law; but it had at law a very narrow range of purpose and application, lying only in the case of a joint-bailment by the claimants (b).

*Mitchell v. Hayne*,—plaintiff to a bill of interpleader must have had no

In order that a party might interplead in equity, it was essential that he should have no personal interest in the subject-matter. Therefore where, as in *Mitchell v. Hayne* (c), plaintiff, an auctioneer, had sold

(a) Mitford on Pleading, 58, 59; *Jones v. Thomas*, 2 Sm. & Giff. 186; and see *Prudential Assurance Company v. Thomas*, L. R. 3 Ch. 74.

(b) *Crawshaw v. Thornton*, 2 My. & Cr. 1, 21.

(c) 2 Sim. & Stu. 63.

an estate for one of the defendants, and the other defendant, who was the purchaser, had commenced an action against the plaintiff for the deposit, and the plaintiff prayed an interpleader and injunction, offering, at the same time, to pay the deposit money into court, *after deducting* his commission,—the Vice-Chancellor refused the bill, saying, “Interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, and as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by the interpleader between the defendants” (d).

Moreover, the plaintiff in interpleader, besides having had no personal interest in the subject-matter, must also have been under no personal liability to either of the claimants; and therefore where, as in *Crawshay v. Thornton* (e), A. deposited certain iron with B. & Co., who were wharfingers, and afterwards directed them to deliver it to C.; and C. applied to B. & Co. to know the particulars of the iron held by them on his account; and B. & Co. then wrote a letter to C., saying that in compliance with his request they annexed a note to the landing weights of the iron transferred into his name by A., and now held by them (B. & Co.) at his (C.’s) disposal; and B. & Co. subsequently received notice from D. that the iron belonged to him; and B. & Co. then filed a bill of interpleader against C. and D,—it was held that they could not maintain interpleader, for *after their letter to C.* he had a right against them independently of the question whether D. was or was not entitled to the iron,—the Lord Chancellor saying as follows:—

“The case tendered by every such bill of interpleader ought to be, that the whole of the rights claimed

personal  
interest in  
the subject-  
matter.

*Crawshay v. Thornton*,—  
plaintiff must  
have been  
under no  
personal  
liability.

It was essen-  
tial in an  
interpleader

(d) *Langston v. Boylston*, 2 Ves. Jr. 109; and see *Attenborough v. St. Catharine Docks Co.*, 3 C. P. D. 373, 467.

(e) 2 My. & Cr. 1, 19.

that the whole of the rights claimed by the defendants should be finally determined by the litigation.

by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest; *because if the plaintiffs have come under any personal obligation, independently of the question of property, so that either of the defendants may recover against them at law without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs; and the injunction, which is of course if the case be a proper subject for interpleader, would deprive a defendant having such a case, beyond the question of property, of part of his legal remedy, with the possibility, at least, of failing in the contest with his co-defendant; in which case the injunction would deprive him of a legal right, without affording him any equivalent or compensation."*

Interpleader where one title was legal and the other equitable.

It was sufficient to give jurisdiction in interpleader, that the title of one of the claimants was legal and of the other equitable (*f*), and it was not necessary that the titles of both claimants should be legal or should be equitable. Therefore, if a debt had been assigned, and a controversy arose between the assignor and the assignee respecting the title, a bill of interpleader might have been brought by the debtor to have the point settled to whom he should pay (*g*); and in fact, where one of the claims was purely equitable, it was formerly indispensable to come into equity; for in such a case there could have been no interpleader at law (*h*); but after the Common Law Procedure Act, 1860, courts of law would on an interpleader issue have taken into consideration the equitable rights of the parties (*i*). And, on the other hand, in the case

(*f*) *Paris v. Gilham*, Coop. 56; *Morgan v. Marsack*, 2 Mer. 107.

(*g*) *Wright v. Ward*, 4 Russ. 215.

(*h*) *Bolton v. Williams*, 4 Bro. C. C. 309.

(*i*) *Rusden v. Pope*, L. R. 3 Ex. 269.

of adverse independent legal titles, the party holding the property was not entitled to interplead in equity, for that would have been to assume the right to try merely legal questions (*j*). No interpleader in case of adverse independent legal titles.

It was a settled rule of law, and of equity also, that an agent should not be allowed to dispute the title of his principal to property which he had received from or for his principal (*k*); and he could not therefore in general interplead, although in exceptional cases he might do so. For example, if the principal had created an interest in or lien on the fund or property in favour of a third person, and the nature and extent of that interest or lien was in controversy between the principal and such third person, then the agent might, for his own protection, have had interpleader to compel the principal and such third person to litigate their respective titles to the fund or property (*l*). Agent could not have interpleader against his principal. Except where principal had created a lien in favour of a third party.

Also, a tenant could not in general have had interpleader against his landlord and a stranger claiming under a title adverse to his landlord; for a bill of interpleader was where two persons claimed of a third the *same* debt or the *same* duty, and in the case of an adverse claimant it was clear he could not be claiming the *same* debt; for *the rent due upon the demise was a different demand from that which some other person might have upon the occupation of the premises* (*m*). But equity would, even in the case of a tenant, have granted relief by way of interpleader if the persons claiming the *same* rent claimed in privity of contract or of tenure, as in the case of a mortgagor and a mortgagee; and as in the case of a trustee and a *cestui* Tenant could not file a bill against his landlord, and a stranger claiming by a paramount title. Cases where a tenant might bring a bill of interpleader.

(*j*) *Pearson v. Cardon*, 2 Russ. & M. 606, 610.

(*k*) *Dixon v. Hammond*, 2 B. & Ald. 313; *Nicholson v. Knowles*, 5 Madd. 47.

(*l*) *Smith v. Hammond*, 6 Sim. 10; *Wright v. Ward*, 4 Russ. 215, 220.

(*m*) *Dungey v. Angove*, 2 Ves. Jr. 310; *Cook v. Rosslyn*, 1 Giff. 167.



*que trust*; or where an estate was settled to the separate use of a married woman, of which the tenant had notice, and the husband had been in receipt of the rent (*n*). In cases of this sort the tenant did not dispute the title of his landlord, but he affirmed that title, and the tenure and contract by which the rent was payable, and put himself upon the mere uncertainty of the person to whom he was to pay the rent.

Sheriff seizing goods could not file a bill of interpleader.

A bill of interpleader could not have been filed by a sheriff who had seized goods in execution against two or more persons putting forward adverse claims to the property, *scil.* because interpleader lay "where two persons claimed of a third the same debt or the same duty," and by the seizure the sheriff, as to one of the defendants, admitted himself a wrong-doer (*o*); nevertheless, equity would have allowed interpleader by a sheriff where there were conflicting equitable claims on the property which he had seized (*p*).

Interpleader under the Judicature Acts, and certain statutes prior thereto.

And under the statutes 1 & 2 Will. IV., c. 58, and 23 & 24 Vict., c. 126, the common law courts acquired a more extensive jurisdiction in interpleader; for by the former of these Acts the benefit of an interpleader was extended to the sheriff; and by the latter of them, the parties might have interpleader, although their titles were not derived from one common source. And by Order i., Rule 2, of the new procedure under the Judicature Acts, it is provided with respect to interpleader, that the procedure and practice in use at common law under the two last-mentioned Acts shall apply to all actions in all the divisions of the High Court of Justice. Under these Acts, the application

(*n*) *Hodges v. Smith*, 1 Cox, 357; *Clarke v. Byne*, 13 Ves. 383; *Johnson v. Atkinson*, 3 Anst. 798.

(*o*) *Slingsby v. Boulton*, 1 V. & B. 335.

(*p*) *Daniell's Ch. Pr.* 1416; *Tufton v. Harding*, 6 Jur. N.S. 116; *Hale v. Saloon Omnibus Co.*, 4 Drew. 492; *Dutton v. Furness*, 12 Jur. N.S. 386; s. c. 35 Beav. 461.

is made to a judge at Chambers, and if made by a defendant, it is made at any time after service of the writ in the action, and after the defendant's appearance thereto, but before delivery of his statement of defence; *O. J. W. Order 1* and if made by the sheriff, it is made immediately after he has seized the goods in execution. Apparently, therefore, all the old distinctions between law and equity in respect of interpleader have been merged, and the slow and cumbrous procedure in equity has also been abolished, and the procedure at law has been adopted; but equities and equitable estates are now fully regarded in the Queen's Bench as well as in the Chancery Division (*q*).

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(*q*) See Book II. of this work, "The Practice in Equity," s. 24.

And (12.) That the discovery was not material at the then stage of the action, or that the plaintiff's right to it depended upon the prior decision of some matter in dispute between himself and the defendant.

And all these defences (it is to be observed) are still open to either party to an action, as objections which he may take to discovery under the present practice, whether sought to be obtained by interrogatories, affidavit of documents, or otherwise.

#### Illustrations.

A few illustrations of these various defences will bring out their true character and applicability. Thus,

(1.) An heir-at-law could not, during the life of his ancestor, have obtained discovery of title-deeds of the ancestor's estate, for he had no present title whatever; but an heir-in-tail was entitled to see the deed creating the estate-tail, for he had a present and existing title.

(2.) If it clearly appeared that the action was not maintainable at law, the discovery must have been useless, and therefore would have been refused (*b*); on the other hand, if the point was fairly open to doubt, the discovery, as it might prove useful in the action, would in general have been granted (*c*), unless it was of a kind to be not material at the then stage of the action.

† (3.) No discovery would be granted for any action not purely civil, *e.g.*, a criminal prosecution. And,

(3*a*). Discovery would not be compelled where the effect of it would be a confiscation of the defendant's property (*d*).

(4.) Again, no discovery would be granted against a married woman to compel her to disclose facts which

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(*b*) See *Wallis v. Duke of Portland*, 3 Ves. Jr. 494; *Lord Kensington v. Mansell*, 13 Ves. 240.

(*c*) *Thomas v. Tyler*, 3 Younge & Col. Ex. 255.

(*d*) *United States of America v. M'Rae*, L. R. 3 Ch. 79.

might charge her husband; or against a person standing in a relation of professional confidence to disclose the secrets of his client.

(5.) Where the objection to the discovery was that the defendant was a mere witness and had no interest in the suit, he might of course be examined in the suit as a witness, and there was therefore no ground for any discovery *in aid* (e).

And (6.) A defendant might always object to discovery if he was a *bond fide* purchaser for value without notice of the plaintiff's claim (f).

Also, (7.) Courts of equity would not have granted discovery in aid of an action in another court if the latter court was competent to give discovery, and had always been so competent; but courts of equity did not lose the jurisdiction to grant discovery in aid of an action at law merely because the courts of common law subsequently (*scil.* by the stats. 14 & 15 Vict., c. 99, and 17 & 18 Vict., c. 126) acquired the like jurisdiction (g); and it was not, in fact, until the Judicature Act, 1873, that the peculiar jurisdiction of equity to grant discovery *in aid* became obsolete and superfluous (h).

Courts of equity would not have granted discovery in aid of a voluntary arbitration (i), but would have done so in aid of a compulsory arbitration in an action (j).

Discovery,—  
for what pur-  
poses refused.

No discovery  
in aid of arbi-  
tration.  
Except arbi-  
tration were  
compulsory.

#### SECTION Ia.—On Bills to Perpetuate Testimony, and to take Evidence De bene esse.

Bills to perpetuate testimony were a branch of the

(e) Dan. Ch. Pr. 255.

(f) See *Stanhope v. Earl Verney*, 2 Eden, 81; *Willoughby v. Willoughby*, 1 Term R. 763.

(g) *Lovell v. Galloway*, 17 Beav. 1; *British Emp. Shipping Co. v. Somez*, 3 K. & J. 433.

(h) See *Orr v. Diaper*, L. R. 4 Ch. Div. 92; and compare *Dixon v. Enoch*, L. R. 13 Eq. 400; *Carver v. Pinto Lide*, L. R. 7 Ch. App. 90.

(i) *Street v. Rigby*, 6 Vesey, 821.

(j) *British Emp. Shipping Co. v. Somez*, 3 K. & J. 333.

(a.) Bills to perpetuate testimony.

To preserve evidence in danger of being lost before a question could be litigated.

The objection was, that the depositions were not published till after death of witness.

law of discovery in equity. The object of such bills was to preserve, that is, to perpetuate, evidence when it was in danger of being lost, before the matter to which it related could be made the subject of judicial investigation. The depositions taken under the *decrée* or order made in such cases were not published until after the death of the witnesses; and for this reason chiefly, courts of equity did not generally entertain such bills, unless where it was absolutely necessary to prevent a failure of justice (*k*), or unless where the preservation of the evidence would clearly tend to prevent future litigation (*l*).

If matter could be at once litigated, equity refused to perpetuate testimony.

But equity would not refuse if the matter could not by any means be at once litigated.

If, therefore, it were possible that the matter in controversy could be made the subject of immediate judicial investigation by the party who sought to perpetuate the testimony, there was no reason for giving him the advantage of deferring his proceedings to a future time, and of substituting written depositions for *viva voce* evidence (*m*). But if the party who filed the bill could not bring the matter into immediate judicial investigation (which might have happened when his title was in remainder), or if he himself was in actual possession of the property, in either of these cases equity would have entertained a suit to perpetuate the testimony (*n*).

Equity would not perpetuate evidence of a right which might be barred.

So also the court declined to entertain a bill to perpetuate testimony in support of a right which might be immediately barred, as in the case of a remainderman filing a bill against the tenant-in-tail in possession (*o*).

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(*k*) *Angell v. Angell*, 1 Sim. & Stu. 83; *Llanover v. Homfray*, 13 Ch. Div. 380.

(*l*) Mitford Pl. 172, 173.

(*m*) *Ellice v. Roupell* (No. 1), 32 Beav. 299.

(*n*) St. 1508; *Earl Spencer v. Peek*, L. R. 3 Eq. 415; *Llanover v. Homfray*, 19 Ch. Div. 224.

(*o*) *Dursley v. Fitzhardinge*, 6 Ves. 261.

By the statute 5 & 6 Vict., c. 69, it was enacted, that any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which could not by him be brought to trial *before the happening of such event*, should be entitled to file a bill in Chancery to perpetuate any testimony which might be material for establishing such claim or right (p). Under 5 & 6 Vict., c. 69, every species of right entitled.

Before this statute, a mere expectancy or *spes successionis*, as that of an heir-at-law, was not considered sufficient to sustain a bill to perpetuate testimony, though any interest, however small or remote, even though contingent, which the law would recognise, entitled a party to the relief (q). Before the statute a mere expectancy or *spes successionis* was not enough.

So also, before the statute, a bill to perpetuate testimony was only allowed where some right to *property* was involved (r). And there must have been some right to property.

Also, under the Legitimacy Declaration Act, 1858 (s), the Court of Divorce (now the Probate and Divorce division of the High Court, or indeed any division of that court) is empowered, on the petition of certain persons specially interested, to make decrees declaratory of the legitimacy or illegitimacy of any such petitioner, or of the validity or invalidity of the marriage of his parents or grandparents, or of his own marriage, or of his right to be deemed a natural-born subject (t); but this statute does not extend, *e.g.*, to a petitioner claiming to be declared entitled to an honour or baronetcy (u). Legitimacy Declaration Act, 1858,—Perpetuation of testimony under.

And for that and many other purposes, even since the Judicature Acts, which appear to contain no specific provision regarding the subject, an action in the nature The Judicature Acts,—effect of.

(p) *Campbell v. Earl of Dalhousie*, L. R. 1 H. L. So. App. 462.

(q) *Dursley v. Fitzhardinge*, 6 Ves. 251.

(r) *Townshend Peerage Case*, 10 Cl. & Fin. 289.

(s) 21 & 22 Vict., c. 93.

(t) *Frederick v. Att.-Gen.*, L. R. 3 P. & M. 270.

(u) *Ibid.*, L. R. 3 P. & M. 196.

of a bill to perpetuate testimony still lies, upon the grounds and under the circumstances upon and under which it previously lay.

(b.) Bills to take testimony *de bene esse*.

How distinguished from bills to perpetuate testimony.

Bills to take testimony *de bene esse*, and bills to take the testimony of persons resident abroad, to be used in suits actually pending in the courts, were another branch of the law of discovery in equity. There was this broad distinction between bills of this sort and bills to perpetuate testimony, that the latter could be brought by persons only who were in possession or who could show title, and who could not for the present sue at law, while bills to take testimony *de bene esse* might be brought, not only by persons who were in possession or who could show title, but also by persons who were out of possession and who showed no title, or only the title in dispute, and who were then actually litigating the matter at law; for bills *de bene esse* could be brought only when an action was then depending, and not before (v).

Grounds for exercising the jurisdiction.

Bills to take evidence *de bene esse* would be entertained where important witnesses were so old and infirm that they could not safely travel, or were in a precarious state of health, or were abroad at the time of trial, or wherever, in fact, the justice of the case appeared to require it (w).

The Judicature Acts,—effect of.

The equity jurisdiction, with reference to testimony *de bene esse*, and to take the evidence of persons resident abroad, became of considerably less practical importance after the courts of common law were invested with ample powers for that purpose by the statutes 13 Geo. III., c. 63, s. 44, and 1 Will. IV., c. 22, s. 1;

(v) St. 1513; *Angell v. Angell*, 1 Sim. & Stu. 83.

(w) *Daniell's Ch. Pr.* 816; see *Warner v. Mosses*, 16 Ch. Div. 100; *Llanover v. Homfray*, *Phillips v. Llanover*, 19 Ch. Div. 224; and see sect. 64 of the Practice in Equity, Book II., *infra*.

and, of course, under the Judicature Acts, in lieu of a bill or action to take evidence *de bene esse*, there would now be a mere order to examine *de bene esse*, obtained (under Order xxxvii., Rule 4) from the court or judge before whom the action or matter is proceeding, on a summary application in the pending cause or matter.

## SECTION II.—On Bills *Quia timet* and Bills of Peace.

Bills *quia timet* were in the nature of writs of prevention or of precaution. The party sought the aid of the court because he feared (*quia timet*) some future probable injury to his rights or interests, and not because an injury had already occurred which required compensation or other relief. The nature of the relief given by courts of equity was dependent on circumstances. They interfered sometimes by the appointment of a receiver of rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given or money to be paid over, and sometimes by the mere issuing of an injunction or other remedial process, thus adapting their relief to the precise nature of the particular case and the remedial justice required by it. And even since the Judicature Acts, an action in the nature of a bill *quia timet* may still be brought, but in general the action at the present day is not exclusively in the nature of the old bill *quia timet*, but seeks other substantive relief, the preventive or precautionary relief being merely incidental to such other substantive relief (x). *O. G. Act 1873, s. 4, XLVI*

(a.) *Quia timet*.

In order to prevent wrongs.

Appointment of receivers.

Directing security to be given.

Granting injunctions.

Bills of peace bore some resemblance to bills *quia timet*, although occasionally brought before any suit

(b.) Bills of peace,—how distinguished from bills *quia timet*.

(x) See sects. 118, 123 of the Practice in Equity, Book ii., *infra*; also *Hendriks v. Montagu*, 17 Ch. Div. 638.



was instituted, and were most generally brought after the right had been tried at law.

Bills of peace,  
—their object.

By a bill of peace properly so called was understood a bill brought by a person to establish and perpetuate a right which he claimed, and which, from its very nature, was or might be controverted by different persons in different actions, and justice required that the party should be quieted in the right, if it was already sufficiently established, or if it should be sufficiently established under the direction of the court,—*Interest reipublicæ ut sit finis litium*.

Bills of peace,  
—nature of  
cases for.

Thus, where there was one general right to be established against a great number of persons; or where one person claimed or defended a right against many, or where many claimed or defended a right against one (*y*), the court of equity, having power to bring all the parties before it, would, in order to prevent a multiplicity of suits, proceed to ascertain the general right, either by directing an action or issue at law to try the right, or by determining the right itself under Rolt's Act (*z*), and would then make a decree finally binding on all the parties (*a*). And this has been done, for example, in an action by a lord against his tenants to recover an encroachment made under colour of a right of common; by a party interested, to establish his right to a toll due by custom, or to the profits of a fair; and where a party claimed to be in possession of a right of fishing for a considerable distance in a river, and the riparian proprietors set up several adverse rights, he might have had a bill of peace against all of them to establish his right

Bills of peace,  
—instances of.

(*y*) *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8.

(*z*) 25 & 26 Vict., c. 42.

(*a*) *Smith v. Earl Brownlow*, L. R. 9 Eq. 241; *Warrick v. Queen's College, Oxford*, L. R. 6 Ch. App. 716.

and to quiet his possession (b). And so also where the plaintiff had, after repeated trials, established his right at law, and yet was in danger of further litigation and obstruction to his right from new attempts to controvert it, *e.g.*, in the case of *Earl of Bath v. Sherwin* (c), where the title to land had been five several times tried in an ejectment, and five several verdicts had been given in favour of the plaintiff, the House of Lords granted a perpetual injunction upon the ground that it was the only adequate means of suppressing vexatious litigation, the expense and continuance of which was doing irreparable mischief.

Where a party has conclusively established a right, and is threatened with fresh litigation.

Ejectment,—repetition of, growing oppressive.

It does not appear that bills of peace are in the slightest degree affected by the Judicature Acts, or by the orders and rules thereunder, excepting that they would now be called actions in the nature of bills of peace, and excepting that the High Court (either the Chancery division or the Queen's Bench division thereof) would both establish the right and grant the perpetual injunction quieting the title thereto in one and the same action and by one and the same judgment.

Judicature Acts,—effect of.

### SECTION III.—*On the Cancelling and Delivery up of Documents.*

The jurisdiction of the court of equity to direct the cancellation or delivery up of certain void or voidable instruments was of a protective or preventive character, analogous to the jurisdiction *quia timet*, that is to say, for fear that such instruments might afterwards be vexatiously used, when the evidence to impeach them was lost, or because they were a cloud upon the title of the party (d). It was not usually

Instrument ordered to be delivered up—when?

(b) *Mayor of York v. Pilkington*, 1 Atk. 282; and see *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. App. 8.

(c) *Proc. Ch.* 261; 4 Bro. P. C. 373.

(d) *Cooper v. Joel*, 27 Beav. 313; *Williams v. Bull*, 32 Beav. 574; *Onions v. Cohen*, 2 H. & M. 354; *Peake v. Highfield*, 1 Russ. 559.

Granting of such a decree not a matter of right, but of judicial discretion in the court. Voluntary deed or agreement, not ordinarily relieved against.

If court granted relief, it did so on terms.

a matter of absolute right in the plaintiff, but it was a matter of judicial discretion with the court to grant or to refuse the relief prayed, according to the court's own notions of what was proper. For example, voluntary agreements, although free from fraud, were not enforceable in a court of equity, and yet they would not ordinarily be set aside by the court, being free from fraud; for if a man would bind himself in a voluntary deed, and not reserve a liberty to himself, a power of revocation, a court of equity would not loose the fetters he had put upon himself, but would leave him to lie down under his own folly (e). And even in those cases in which the court would grant relief, it imposed such terms as it thought fit upon the plaintiff, upon the maxim, he who seeks equity must do equity; and if he refused to comply with such terms, his bill was dismissed.

Where plaintiff had good defence to an instrument in equity, though not at law.

A party had a right to come into equity to have agreements, deeds, or securities cancelled, rescinded, or delivered up, where he had a defence to them good in equity, but not capable of being made available at law.

I. *Voidable instruments*,—  
(a.) When cancelled.

Courts of equity would also, in general, set aside and cancel agreements and securities which were voidable merely, and not void, under the following circumstances:—

1. Where there was some actual fraud in the party defendant, in which the party plaintiff had not participated.

2. Where there was some constructive fraud against

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(e) See *Villers v. Beaumont*, 1 Vern. 101; *Bill v. Cureton*, 2 My. & K. 503; *Petre v. Espinasse*, 2 My. & K. 496; and see also the more modern cases, *Hall v. Hall*, L. R. 8 Ch. App. 430; *Coutts v. Acworth*, L. R. 8 Eq. 558; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Henry v. Armstrong*, 18 Ch. Div. 668.

public policy, and the party plaintiff had not participated therein.

3. Where there was some constructive fraud against public policy, and the party plaintiff had participated therein, *e.g.*, gaming securities, which would be decreed to be delivered up, notwithstanding both parties had participated in the fraud, because public policy would be best served by such a course (*f*).

4. Where there was some constructive fraud in both parties, but they were not both of them *in pari delicto*, *e.g.*, cases in which the party seeking relief had acted under circumstances of oppression, imposition, hardship, or other undue influence. X

On the other hand, where the party seeking relief was the sole guilty party, or where he had participated equally and deliberately in the fraud, or where the agreement which he wanted to set aside was founded on illegality, immorality, or some base or unconscionable conduct on his own part; in such cases, courts of equity would leave him to the consequences of his own iniquity, and would decline to assist him to escape from the toils which he had studiously prepared for others, or whereby he had sought to violate with impunity the interests or the morals of society (*g*).

As regards, on the other hand, instruments which were utterly void, and not merely voidable, there used to be some doubt among equity practitioners whether, the instrument being utterly void and incapable of being enforced even at law, the remedial justice of courts of law to protect the party was not adequate

(*f*) *Earl of Milltown v. Stewart*, 3 Mylne & Craig, 18; *W— v. B—*, 32 Beav. 574; *Quarrier v. Colston*, 1 Phillips, Ch. R. 147.

(*g*) *Franco v. Bolton*, 3 Ves. Jr. 386, 372; *St. John v. St. John*, 11 Ves. 535, 536; *Ayerst v. Jenkins*, L. R. 16 Eq. 275.

I. *Voidable instruments*,—  
(b.) When not cancelled.

II. *Void instruments*,—  
difficulty with.

(a.) When delivered up,  
and upon what grounds.

and complete, so as to obviate the necessity of the interposition of courts of equity (h); but this doubt has been put to rest by the modern decisions, and the jurisdiction of equity to order a delivery up of void documents has been fully established in all cases in which the delivery up of the document might help to prevent the perpetration of some further wrong (i). Moreover, the jurisdiction in these cases has been put on the general principle of equity, that it is better to prevent than to relieve. If, therefore, an instrument was of such turpitude that it ought not to be used or enforced, it was against conscience for the party holding it to retain it, since he could only retain it for some sinister purpose. If it was a negotiable instrument, it might also have been used for a fraudulent or improper purpose to the injury of some one or other. If it was a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily had a tendency to throw a cloud upon the title. If it was a written agreement, solemn or otherwise, while it existed it was always liable to be applied to improper purposes, and it might be vexatiously litigated at a distance of time, when the proper evidence to repel the claim might have been lost or obscured (j).

(b.) When not delivered up,  
and upon what grounds.

On the other hand, where the illegality of the agreement, deed, or other instrument appeared upon the face of it, so that its nullity could admit of no doubt, and its capacity therefore to be made the means of perpetrating some further wrong was wholly paralysed, there was not the same reason for the interference of a court of equity to direct it to be cancelled or delivered up. In such a case there could be no

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(h) *Hilton v. Barrow*, 1 Ves. Jr. 284; *Ryan v. Mackmath*, 3 Bro. C. C. 15, 16.

(i) Mr. Swanston's note to *Davis v. Duke of Marlborough*, 2 Swans. 157.

(j) *Bromley v. Holland*, 7 Ves. 20, 21; *Kemp v. Prior*, Ves. 248, 249.

danger that the lapse of time would deprive the party of his full means of defence; nor could such a paper throw a cloud upon any title, or diminish any one's security, or be used as a means of vexatious litigation, or for any other or sensible injury. And, accordingly, it was fully established that in such cases courts of equity would not interpose their authority to order the delivery up of the void instrument (*k*).

Under the Judicature Acts, every ground of defence and every variety of relief and of protection and prevention being now equally available in, and equally procurable from, all the divisions of the High Court of Justice, it is clear that the jurisdiction in equity in such matters, so far as it survives, is no longer either *exclusive* or *auxiliary*, but is strictly speaking *concurrent*, although (for reasons of convenience) it is by the Judicature Act, 1873 (*l*), assigned to the Chancery Division as portion of its *exclusive* jurisdiction; but the grounds of the jurisdiction in equity do not appear to be otherwise materially altered.

Judicature  
Acts,—effect  
of.

#### SECTION IV.—*On Bills to Establish Wills.*

Although courts of equity had no general jurisdiction over wills, the proper court having been, as regards personality, the Ecclesiastical Court, and latterly the Court of Probate, its successor (*m*), and as regards realty, the Court of Common Pleas or of the Queen's Bench, and latterly (upon citation of the heir and devisee) the Court of Probate (*n*), yet whenever a will came incidentally into question before courts of equity, as when these courts were called upon to execute the trusts of

Court of Pro-  
bate.  
Equity dealt  
with wills in-  
cidentally.

(*k*) *Simpson v. Lord Howden*, 3 Mylne & Cr. 97; *Bromley v. Holland*, 7 Ves. 16; *Threfall v. Lunt*, 7 Sim. 627; *Hurd v. Bilton*, 6 Gr. 145.

(*l*) Sect. 34, sub-sect. 3.

(*m*) 20 & 21 Vict., c. 77, ss. 61, 62.

(*n*) *Ibid.*

the will, they necessarily acquired some *jurisdiction* regarding wills (o). In such a case, if the validity of the will was admitted, or already established elsewhere, the courts of equity acted upon it to the fullest extent; but if the parties did not admit the validity of the will, and the same had not been established elsewhere, the court of equity in which the cause was depending would have caused the validity of the will to be established, and for that purpose would either have directed an issue or issues to be tried at the assizes, and upon the finding, or ultimate finding, would have declared the will established, or would itself have tried the question and established the will on its own finding, which latter course was called proving the will in Chancery *per testes* (p); and if the will were once established, a perpetual injunction would have been decreed against the heir.

Devisee might come into equity to establish a will against heir-at-law.

But further, it was often the principal object of a suit in equity, *e.g.*, when brought by the devisee or devisees, to establish the validity of the will, being a will of real estate, and to obtain thereupon a perpetual injunction against the heir-at-law, to prevent him from contesting its validity in the future (q). And the jurisdiction was assumed in such a case by the court of equity because the devisee had no present power to actively litigate the validity of the will at law, but was obliged to wait until the heir-at-law should (if he ever would) commence an ejectment at law. And accordingly, in the case of *Boyse v. Rossborough* (r), it was decided that a devisee in possession was entitled to have the will established against the heir-at-law of the testator, although the heir had brought no action of ejectment against the devisee, although no trusts

Even though the heir-at-law had brought no ejectment.

(o) *Sheffield v. Duchess of Buckinghamshire*, 1 Atk. 630.

(p) See also Rolt's Act, 25 & 26 Vict. c. 42.

(q) *Bootle v. Blundell*, 19 Ves. 494, 509.

(r) *Kay*, 71; 1 K. & J. 124; 3 De G. M. & G. 817; 6 H. L. Cas. 1.

were declared by the will, and although it was not necessary to administer the estate under the direction of the Court of Chancery. And it was further determined, that the Court of Chancery had power to establish a will against parties claiming under a prior will, and disputing the plaintiff's claim, a devisee being entitled to have the will established and his title quieted, not only as against the heir, but against all persons setting up adverse rights (s). In such cases the jurisdiction exercised by courts of equity was obviously analogous to that exercised in the case of bills *quia timet*, and was founded upon the like considerations, namely, to give security and repose to titles while the evidence for them was abundant.

Devisee might establish a will against all setting up an adverse right.

But on the other hand, the heir-at-law could not come into a court of equity (excepting by consent of the devisee) to have the validity of the will tried, *scil.* because he had a legal remedy by ejectment; but if there were any impediments to the proper trial of the merits of such an ejectment, he might have come into equity to have such impediments removed (t); and on a bill by such heir, praying an issue *devisavit vel non*, for the purpose of obtaining incidental relief, the court might, under Rolt's Act (u), s. 2, have determined the question itself, or in its discretion might have directed an issue to be tried at law, and in these cases the heir was entitled as of right to a trial by jury (v).

The heir-at-law could only come into equity by consent.

The facilities of proving a will in the Probate Division are now very great. When the will has the usual attestation clause, it is proved by the simple oath of the executor, that he believes the will to be

Proof of will in Court of Probate,—effect of.

(s) *Lovett v. Lovett*, 3 K. & J. 1.

(t) Sm. Man. 409.

(u) 25 & 26 Vict., c. 42.

(v) Dan. Ch. Prac. 938, 945; *Banks v. Goodfellow*, 40 L. J. Ch. 511.



(1.) When will  
is proved in  
solemn form.

X

(2.) When will  
is proved in  
common form.

X

the true last will; but when the will has not that attestation clause, then, in addition to the executor's oath to the effect aforesaid, there is required also from one of the subscribing witnesses an affidavit of due execution by the testator; and probate in either of these forms is called probate in common form. Probate in solemn form is where both the attesting witnesses are sworn and examined, and other corroborative evidence is taken, in the presence of the widow and next of kin, including the heir. When the will has once been proved in solemn form, the probate is not only sufficient but conclusive proof of the will (*w*); but when the probate has been in common form, and in some subsequent action affecting real estate it is necessary to establish the devise, the plaintiff gives to the defendant ten days at least before the trial notice that he intends using at the trial the probate, and thereupon such probate becomes sufficient evidence, unless the defendant within four days after receiving the notice gives a counter-notice to the effect that he disputes the devise (*x*); and in that latter case, it would be necessary to prove the will as a substantive independent fact, in accordance with the ordinary rules of evidence.

*Allen v.*  
*M'Pherson*,—  
the facts of,  
and decision  
in.

In connection with the jurisdiction in equity to establish wills, and the facilities that are now afforded in the Court of Probate in proving a will, reference should be made to the two cases of *Allen v. M'Pherson* (*y*), and *Meluish v. Milton* (*z*). In the former of these two cases, it appeared that a testator by his will and certain codicils thereto gave R. A. large bequests, and by a final codicil revoked all these bequests and substituted for them a small weekly allowance for R. A.'s

(*w*) 20 & 21 Vict., c. 77, s. 62.

(*x*) 20 & 21 Vict., c. 77, s. 64.

(*y*) 1 H. L. Ca. 191.

(*z*) L. R. 3 Ch. Div. 27; and see *Rhodes v. Rhodes*, 7 App. Ca. 192.

life only. The will and all the codicils were admitted to probate in the Ecclesiastical Court (being the then Court of Probate). Subsequently to such probate, R. A. filed his bill in the Court of Chancery, alleging that the testator had executed the last codicil under the undue influence of the residuary legatee, who had falsely represented R. A.'s character to the testator, and further alleging that it had not been open to him in the Ecclesiastical Court to take objection to the validity of such codicil on that ground, and praying that the residuary legatee might be declared a trustee for R. A. to the extent of the revoked bequests. But it was held that the Court of Chancery had no jurisdiction in the matter. And in the case of *Meluish v. Milton*, *supra*, it appeared that the testator made a will giving all his property to the defendant (whom he described as his wife), and also appointing her sole executrix. She proved the will in the Court of Probate. The heir-at-law and sole next of kin of the testator subsequently filed his bill against the defendant, alleging that the defendant was not the testator's lawful wife, and that she had obtained the property by fraudulently deceiving the testator on that head, and praying that she might be declared a trustee of the property for him. But the court (James, Mellish, and Baggalay, L.J.J.) held that the Court of Chancery had no jurisdiction to entertain the case, which was exclusively within the jurisdiction of the Court of Probate.

The two last-mentioned cases appear to be conclusive against the jurisdiction of the Chancery Division of the High Court, as regards wills and codicils dealing with personal estate (with or without real estate), or containing even an appointment of an executor, although not otherwise purporting to deal with personal estate: in all these cases, the Court of Probate has jurisdiction, and it is in that court (or the now

The present jurisdiction of the equity division.

X dealing with personal estate (with or without real estate), or containing even an appointment of an executor, although not otherwise purporting to deal with personal estate: in all these cases, the Court of Probate has jurisdiction, and it is in that court (or the now

X corresponding division of the High Court) that all objections to wills or to parts of wills on the ground of fraud or mistake must now be taken, the decision of the Probate Division not being reversible by the Chancery Division (a). But the Probate Court has no jurisdiction, even since the Judicature Acts (b), in the matter of wills not dealing with personal estate and not containing any appointment of executors, but dealing with real estate only. Consequently, in the case of a will of real estate only, the rule contained in *Boyse v. Rossborough*, *supra*, would appear still to hold good, and not to be affected by the cases of *Allen v. M'Pherson* and *Meluish v. Milton*, *supra*, so that in this case the Chancery Division of the High Court would still have jurisdiction to establish wills; and, in fact, any division of the High Court has, under the Judicature Acts, jurisdiction to grant probate, but for obvious reasons does not choose to exercise the jurisdiction (c).

### SECTION V.—On the Writ “*Ne exeat regno*.”

To prevent  
a person leaving  
the realm.

The writ of *ne exeat regno* was and is a prerogative writ, which issued and issues to prevent a person from leaving the realm; in its origin, it was only applied to great political objects and purposes of state, for the safety and benefit of the realm; and such having been the character of its origin, it is at the present day applied in favour of the subject and his alleged private rights with great caution and jealousy.

General rule,  
—granted only  
in cases of  
equitable  
debts. +

In general, the writ of *ne exeat regno* would not and will not be granted unless in cases of equitable debts and claims; and it is, in fact, a kind of equitable bail

(a) *Betts v. Doughty*, 5 P. D. 26; *Morrell v. Morrell*, 7 P. D. 68.

(b) See Act 1873, s. 34, and Act 1875, s. 11, sub-sect. 3.

(c) *Pinney v. Hunt*, L. R. 6 Ch. Div. 98; and see L. R. 6 Ch. Div. 101.

to appear to and to abide by the result of the action; and therefore, if the debt was or is one demandable at law, the writ would and will be refused, the remedy at law being open to the party. Also, the equitable demand must have been and must be certain as to its nature, and actually payable and not contingent; and it should also have been and should be for some debt or pecuniary demand; for the writ would not and will not be issued in a case where the demand was or is of a general unliquidated nature, or was or is in the nature of damages, no definite amount being admitted by the defendant.

To the general rule that the writ of *ne exeat regno* lay and lies only in respect of equitable debts, there were and are two recognised exceptions, that is to say,—

1. Where alimony had or has been decreed to a wife, it would and will be enforced in a proper case against a husband by a writ of *ne exeat regno*, provided the alimony have been actually decreed. 1. In cases of alimony decreed, where husband intends leaving the jurisdiction.
2. Where the defendant admitted a balance due by him to the plaintiff, but a larger sum was claimed by the plaintiff, the writ would be issued, for the uncertainty of the whole amount claimed did not matter in such a case, there being an admitted certainty as to a sufficient part, and matters of account were always properly cognisable in the court of equity (*d*). 2. In cases where there is an admitted balance, but plaintiff claims a larger sum.

A writ of *ne exeat regno* may also now issue summarily under the Absconding Debtors' Act, 1870 (*e*), where the debtor is going abroad after the issue of a debtor's summons against him under the Bankruptcy Act, 1869 (*f*).

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(*d*) *Sobey v. Sobey*, L. R. 15 Eq. 200. (*e*) 33 & 34 Vict., c. 76.  
 (*f*) *Lees v. Patterson*, 7 Ch. Div. 866; *Drover v. Beyer*, 13 Ch. Div. 242. See also Debtors' Act, 1869, s. 6.

Judicature  
Acts,—effect  
of.

The Judicature Acts do not appear to have in any respect altered the equitable jurisdiction in respect of the writ *ne exeat regno*; although it may be a question whether the writ would not now issue for legal as well as for equitable debts (g), assuming that the other circumstances of the case were proper for the exercise by the court of this jurisdiction.

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(g) Judicature Act, 1873, s. 24, sub-sect. 7.

## BOOK II.

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# THE PRACTICE IN EQUITY.

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### SECTIONS 1-4.

THE COURTS (SUPERIOR AND INFERIOR, ORIGINAL AND APPELLATE) HAVING JURISDICTION IN EQUITY,—ALSO, THE JURISDICTION THEREOF.

§ 1. *The Chancery Division.*—*The Courts Original and Appellate.*—Firstly, there is the High Court, consisting of the Rolls Court, and the courts formerly of the three Vice-Chancellors, and now of the survivors of them, and of the successors of such of them as are dead (each of these four courts having chambers attached to it), and the court of the Additional Judge appointed under the Supreme Court of Judicature Act, 1877 (40 Vict., c. 9), but having no chambers attached to it. [The Common Law Division, formerly consisting of the Queen's Bench, Common Pleas, and Exchequer Divisions, and now of the Queen's Bench Division simply, has also full jurisdiction in equity, but (for reasons of convenience) does not choose to exercise that jurisdiction, excepting where and so far as equitable matters arise incidentally in the course of the proper jurisdiction of this division.]

Secondly, There is the Court of Appeal, consisting of the Lords Justices, three of them, at the least, being required upon all appeals from judgments (final or in-

terlocutory), and two of them, at the least, in all appeals from interlocutory orders (Act 1876,\* s. 12). There are usually two divisions of this Court sitting, one at Lincoln's Inn for matters arising in the Chancery Division (and in the Probate Division), [and one at Westminster for matters arising in the Common Law Division]. The Court of Appeal has only appellate jurisdiction, but may exercise such original jurisdiction as is incidental thereto (Act 1873, s. 19) (a).

Thirdly, There is the House of Lords, to which an appeal lies from every judgment (whether final or interlocutory), and also from every interlocutory order of the Court of Appeal in Chancery (b).

§ 2. *The Chancery Division. — General Jurisdiction of.*—The matters assigned (and, in effect, *exclusively* assigned) to the Chancery Division of the High Court (Act 1873, s. 34) are the following:—

- (1.) All causes and matters (other than appeals from County Courts), which, by any particular or general statute, have been, or shall be, *exclusively* assigned to that division; and
- (2.) All causes and matters connected with the following matters, namely:
  - (a) Administration of Estates;
  - (b) Partnerships,—Dissolution and Accounts;

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\* Act 1873, means the Judicature Act, 1873; Act 1875, means the Judicature Act, 1875; Act 1876, means the Appellate Jurisdiction Act, 1876; and Acts 1877, 1879, 1881, mean respectively the Judicature Act, 1877, 1879, 1881; also, Roman numerals denote the number of *Order*, and Arabic numerals denote the number of *Rule*, the Orders and Rules of the Supreme Court being (for the sake of brevity) so denoted throughout this Epitome of Practice. Matter stated within *square brackets*, thus [ ], appertains mostly to the Common Law Division.

(a) *Wilson v. Church*, 11 Ch. Div. 576; *British Dynamite Company v. Krebs*, 11 Ch. Div. 448.

(b) *Walsall Overseers v. L. & N. W. Railway Co.*, 4 App. Cases, 30.

- (c) Mortgages,—Redemption and Foreclosure ;
- (d) Portions and other Charges on Land,—Raising of ;
- (e) Liens and Charges on Property,—Sale of such Property, and distribution of proceeds of sale ;
- (f) Trusts (Public or Private),—Execution of ;
- (g) Deeds and other Instruments,—Cancellation, or Setting aside, or Rectification thereof ;
- (h) Sales and Leases, Contracts for,—Specific Performance of ;
- (i) Real Estate,—Partition and Sale of ;
- (k) Infants,—Custody of their Persons and Estates (Act 1873, s. 34) ; and (practically)
- (l) Lunatics so found by inquisition (Act 1875, s. 7) ; besides, also—
- (m) Lunatics not so found (c), and besides also—
- (n) Married Women,—in all the intricate questions relating to their property, whether settled to their separate use or not.

And the Chancery Division has also *concurrent* jurisdiction in every matter or thing (of a CIVIL character) in which the Common Law Division has jurisdiction,—*e.g.*, a matter of account, however simple, is now the subject of equitable jurisdiction, and even, *semble*, an injunction may be granted to restrain the publication of a libel (d).

[Similarly, the Common Law Division has still exclusive jurisdiction in all causes and matters, civil and criminal, which would have fallen exclusively to the courts at Westminster if the Judicature Act had not been passed (Act 1873, s. 34) (e) ; but in every

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(c) *Vane v. Vane*, 2 Ch. Div. 124 ; and see *Ex parte Cahen*, *In re Cahen*, 10 Ch. Div. 183.

(d) *Hinrichs v. Berndes*, W. N. 1878, p. 11 ; *Thorley's Cattle Food Co. v. Massam*, 14 Ch. Div. 763 ; *Thomas v. Williams*, 14 Ch. Div. 864 ; *Quartz Gold Co. v. Beall*, 20 Ch. Div. 501.

(e) *Re Ellershaw*, *ex parte Longbottom*, 1 Q. B. Div. 481 ; and see *Glossop v. Heston and Isleworth Local Board*, 12 Ch. Div. 102.



case subject to the more general provisions of the Judicature Acts, under which each division has all the jurisdiction of the other.]

§ 3. *Divisional Courts.*—*Matters for.*—The various business for these courts may be classified as under :—

- (1.) All appeals (from Petty or Quarter Sessions) from a County Court, or from any other Inferior Court, which, before the Judicature Acts, 1873–5, lay to the Superior Courts of Law or Equity (Act 1875, s. 45 ; lvii. a, 1) ;
- (2.) Cases, or points in cases, reserved at trials for the consideration of the Divisional Court, and cases or points in cases directed at trials to be argued before the Divisional Court (Act 1873, s. 46) ;
- (3.) Applications for New Trials, from a trial before a Judge *with* a Jury (xxxix. 1 ; lvii. a, 1, Dec. 1876) ; and also applications for New Trials from a trial in the County Court, even without a jury (*f*).
- (4.) Applications for orders charging stock or shares (xlvi. 1) ; and
- (5.) The following civil (besides certain election and criminal) proceedings, viz. :—
  - (a) Proceedings directed by Act of Parliament to be taken before the Court, when the Court's decision is final ;
  - (b) Cases stated by the Railway Commissioners ;
  - (c) Special cases, by agreement of all parties ; and
  - (d) Appeals from the Common Law Chambers to the Court (lvii. a, 1).

There are very few matters in equity that go to Divi-

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(*f*) *London v. Roffey*, 3 Q. B. Div. 6 ; *Davis v. Godbehere*, 4 Exch. Div. 215.

sional Courts, and when any such arise they are taken to the Divisional Court sitting at Westminster; *e.g.*, applications for New Trials, when trial before judge *with* a jury; also, equity appeals from County Courts (*g*).

Appeals (where they lie) from a Divisional Court are to the Court of Appeal, and thence to the House of Lords (*h*).

§ 4. *Inferior Courts (including County Courts).*—*General Jurisdiction of.*—Every inferior court having jurisdiction in equity, or in both law and equity, is to grant (in all proceedings before it) such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and is also to grant such or the like effect to every ground of defence or counter-claim, equitable or legal, in as full a manner as the High Court may and ought to grant (Act 1873, s. 89); *e.g.*, it may issue an injunction, and also commit or attach for breach of the injunction (*i*), not being an injunction to stay an action in the High Court (*j*), although it may make an order staying action in County Court (*k*); and it may also commit for disobedience of an order for production of documents (*l*), but its jurisdiction is subject to this one exception or limitation, *viz.*, that where the defence or counter-claim involves matter beyond the jurisdiction of such inferior court, no relief is to be given thereon beyond the limit of the jurisdiction of the inferior court (Act 1873, s. 90) (*m*); but

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(*g*) *Hunt v. City of London Real Property Co.*, 2 Q. B. Div. 605; 3 Q. B. Div. 19; *Clarke v. Roche*, 3 Q. B. Div. 170.

(*h*) *The Queen v. Pemberton and Smith*, 5 Q. B. Div. 95; *Morgan v. Rees*, 6 Q. B. Div. 508.

(*i*) *Reg. v. Harington*, W. N. 1879, p. 14; *Ex parte Martin*, 4 Q. B. Div. 212; *Martin v. Bannister*, 4 Q. B. Div. 491.

(*j*) *Cobbold v. Pryke*, 4 Exch. Div. 315.

(*k*) *The Queen v. Bayley*, 8 Q. B. Div. 411.

(*l*) *Richards v. Cullerne*, W. N. 1881, p. 120.

(*m*) *Davis v. Flagstaff Silver Mining Co.*, 3 C. P. Div. 228.

such limited relief may be given, or the entire action may (on the application of either party) be transferred into the High Court (Act 1873, s. 90). As regards removal of action generally from County Court into High Court, see 28 & 29 Vict., c. 99, for Chancery matters [and 19 & 20 Vict., c. 108, for Common Law matters]; and conversely, as regards removal of action generally from High Court into County Court, see 30 & 31 Vict., c. 142, s. 7, for Chancery and Common Law matters equally (n).

The appeal from an inferior court, including the Lord Mayor's Court (o), is to a divisional court of the High Court, and the decision of such divisional court is usually final (Act 1873, s. 45), but may (with the leave of the divisional court) be appealed to the Court of Appeal (Act 1873, s. 45). And in the case of an action remitted from the High Court to the County Court, a New Trial is to be moved for in, or an appeal brought to, a divisional court, even when trial has been without a jury (p).

## SECTION 5.

### THE FORMAL PROCEDURE AND THE SUMMARY PROCEDURE DISTINGUISHED.

The *formal* procedure is the regular *de cursu* procedure in an action properly so called, commencing with a writ (i. 1), and proceeding successively to statement of claim and statement of defence, with or without a reply or other subsequent pleadings, and thereafter to

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(n) *Osborne v. Homburg*, 1 Exch. Div. 48; *Foster v. Underwood*, 3 Exch. Div. 1; *Welpby v. Bull*, 3 Q. B. Div. 80, 253; and distinguish *Insley v. Jones*, 4 Exch. Div. 16.

(o) *Appleford v. Judkins*, 3 C. P. Div. 489, overruling *Le Blanch v. Reuter's Telegraph Co.*, 1 Exch. Div. 408; and consider *Mears v. Chittick*, 9 Q. B. Div. 35.

(p) *London v. Roffey*, 3 Q. B. Div. 6; *Davis v. Godbehere*, 4 Exch. Div. 215; *Bowles v. Drake*, 8 Q. B. Div. 325.

argument or (as the case may require) to trial and argument both, and to judgment, or (as the case may be) to verdict and judgment both, followed up with satisfaction of the judgment. The particular steps of this *de cursu* procedure are successively detailed hereunder. It is conceivable, although it rarely happens, that nothing but the formal procedure should be used in an action; more often, however, and in fact almost always, many incidental proceedings intervene in the progress of every action from its commencement to its conclusion, such incidental proceedings being necessitated by various occasions arising in the action, and being disposed of in an expeditious and less formal or informal manner, whence these latter proceedings of an occasional and *prout res exigit* character are commonly designated and classified together as the *summary* procedure in the action. The particular occasions for the exercise of the summary procedure are indicated hereunder, and in general at the particular stages at which they respectively arise in the action.

Besides the summary jurisdiction in an action, the Chancery Division of the High Court exercises also a large summary jurisdiction upon petition, motion, and summons, independently of the pendency of any action, and solely by virtue of certain statutory provisions in that behalf; and sometimes by reason merely of the court having seisin of the subject-matter, *e.g.*, where money has been paid into court under the Act for the Relief of Trustees (*q*). This particular summary or statutory jurisdiction is wholly excluded from this epitome of the "Practice in Equity," but it will be found very conveniently stated in Morgan's *Chancery Acts and Orders*, 4th and 5th editions. [Similarly, the Queen's Bench Division exercises a like large summary jurisdiction under the provisions of particular

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(q) *In re Slater's Trusts*, 11 Ch. Div. 227.

statutes, and sometimes by force merely of the original jurisdiction vested in them before the Judicature Acts; that summary jurisdiction also is wholly excluded from this epitome, but it will be found in Chitty's Archbold's Practice of the Q.B., C.P., and Exchequer, 13th edition.]

### SECTIONS 6-16.

#### THE WRIT OF SUMMONS—THE FORMAL PROCEDURE, WITH THE SUMMARY PROCEDURE INCIDENTAL THERETO.

§ 6. *The Writ of Summons.*—*Preparation and Issue of.*—Having procured an ordinary form of writ at the law stationer's, fill up same with (among other matters which the form itself suggests) the names of the parties on the face of it, and an indication of the plaintiff's claim on the back of it, which indication of claim is called the plaintiff's indorsement of claim; and further, there must be an indorsement of the plaintiff's address for service—such address being his own or his solicitor's office, if that is within three miles of Temple Bar, or else some other specified place within that limit; and in addition thereto (but only when the solicitor is a mere agent of another solicitor), there must be an indorsement of the principal solicitor's name and place of business (iv. 1, 2). These three matters, viz., the selection of the parties, the indorsement of claim, and the indorsement of the address or addresses, having been done, the writ is then taken to the central office; \* and upon payment of ten shillings, an adhesive

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\* The writ of summons in any action may be issued out of any District Registry; and if the defendant resides or trades within the district selected by plaintiff, then the writ is to direct defendant to enter his appearance in the same Registry; but if defendant neither resides nor trades there, then the writ is to mention that the defendant may enter his appearance either in London or in the District Registry (v. 1-3). The plaintiff's "address for service" is to be specified on the writ, being his own or his solicitor's office, if that is within the district, or else some other specified place within the district, and in addition thereto (but only when the defendant neither resides nor trades within the district) an address in London not more than three miles from Temple Bar (iv. 3a; *Smith v. Dobbin*, 3 Exch. Div. 338).

stamp for that amount is affixed to the writ (on the face of it, left hand, near top), and the seal of the office is then impressed upon the writ (on the face of it, left hand near foot), and all (if any) erasures, cancellings, or interlineations on the writ are at the same time marked with a smaller seal impressed, each of them being marked separately. So soon as the writ is so impressed with the seal of the office, it is said to be issued (v. 6). The writ is tested (*i.e.*, witnessed) in the name of the Lord Chancellor or (but only in the case of there being no Lord Chancellor) in the name of the Lord Chief Justice of England, and bears date the day of issue (ii. 8). And the plaintiff marks on the writ the division to which he assigns his action, and (in the Chancery Division) the name of the judge to whom he assigns same (Act 1875, s. 11, sub-sects. 1, 2, 3; v. 4). The plaintiff takes the sealed writ (and which is called the original writ) and leaves a copy of same at the office; and the copy so left is filed in the office, and an entry of the filing is made in the cause-book, and the action is distinguished by the date of the current year of filing, a letter (being the first letter of the plaintiff's surname) and a number (being the number which denotes the order of the particular writ among all the writs entered under the same letter in the same year). This year, letter, and number are marked on the original writ, and on all copies thereof, and on all subsequent documents in the action, on the first page of every such document (right hand, near top).\*

§ 7. *The Writ of Summons.—Indorsement of Claim upon.*—The writ of summons, as already stated, is to

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\* Where the writ issues out of the District Registry, the like steps are gone through; and the name of the particular District Registry is to be specified on the face of the writ (left hand, near top, between, in Chancery matters, Chancery Division and name of particular judges, and, in Common Law matters, immediately under the name of the Division).

be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action (ii. 1); but in such indorsement it is not essential to set forth the precise ground of complaint or the precise remedy or relief to which the plaintiff considers himself entitled (iii. 2); and accordingly, as we shall see (§ 12), the indorsement may be amended so as to extend to any other cause of action or any additional remedy or relief (r); but before issuing his writ, the plaintiff should make sure that the claim which he indorses is a maturely accrued claim (s). If the plaintiff sues, or a defendant is sued, in a representative capacity, the indorsement of claim is to show it (iii. 4). In all cases of ordinary account (*e.g.*, a partnership, executorship, or ordinary trust account), if the plaintiff desires an account in the first instance, the indorsement of claim is to ask expressly for such account (iii. 8); [also, in all actions where the claim is for a debt or liquidated demand in money, with or without interest, the indorsement of claim should be special, that is, should specify the particulars of the amount claimed (iii. 6); and should also include a sum for costs specified separately from the other particulars (iii. 7), and should mention that upon payment of the specified debt and specified costs all further proceedings will be stayed] (t).

§ 7a. *The Writ of Summons.—Special Indorsement of Claim.*—If the action is for the recovery of a debt or liquidated demand in money, with or without interest, and arises on a contract or on a statute, the plaintiff may specially indorse his writ with the particulars of the amount sought to be recovered, giving credit where necessary or proper for any payment or set-off (iii. 6); and in such a case the indorsement is also to

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(r) *Colebourne v. Colebourne*, L. R. 1 Ch. Div. 690.

(s) *Clarke v. Bradlaugh*, 7 Q. B. Div. 121.

(t) See *Ex parte Sewell, in re Sewell*, 13 Ch. Div. 266.

state a sum for costs, and that upon payment of the specified amount, together with such sum for costs, within the time specified on writ, the action will be stayed (iii. 7).

§ 8. *The Writ of Summons.—Service of.*—So soon as the writ is issued, the plaintiff should in general serve same on the defendant or defendants at once. This service is personal, that is, copy of writ must be put into defendant's hands or left in his presence with (in the latter case) a verbal intimation to him that the slip of paper is a copy of writ; and the plaintiff must also show the original writ to the defendant, but, *semble*, only if he desires to see it (*u*). The person serving the writ should immediately (and within three days at the most), after service, indorse on the original writ the day of the month and week of the service (ix. 13).

Where husband and wife are co-defendants, service on the husband is also *prima facie* service on the wife (ix. 3).

Where the defendant is an infant, the service is *prima facie* good if effected on his or her father or guardian, or (if none) then on the person with whom the infant resides, or under whose care he or she is (ix. 4).

Where the defendant is a lunatic so found by inquisition, service on his or her committee is good service, and if there has been an inquisition, but as yet no committee either of the person or of the estate of the lunatic has been appointed, the court will upon motion direct service usually upon the keeper of the asylum, or other the person with whom the lunatic is residing (*v*); and when a defendant of unsound mind has

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(*u*) *Goggs v. Huntingtower*, 12 M. & W. 503; ix. 2.

(*v*) *Thorn v. Smith*, W. N. 1879, p. 81.



not yet been found so by inquisition, the service is *prima facie* good if effected on the person with whom he or she resides, or under whose care he or she is (ix. 5).

Where the defendants are partners, and are described by the partnership name (and not by their individual names), service of the writ is good if effected personally upon any one or more of them, or if effected at the office (if only one), or at the principal office (if more than one), of the partnership, within the jurisdiction, upon the person having at the time of service the control or management of the business there (ix. 6); and the like rule applies where an ostensible partnership consisting in fact of but one person is made a defendant by the ostensible partnership name, and not by his or her own individual name (ix. 6*a*); but where the partnership has been already dissolved at the time of the writ issuing, the service must in general be on each partner personally (*w*).

Where defendant is in legal possession of premises which the plaintiff claims to recover, and the plaintiff cannot effect personal service on the defendant, and the premises are vacant, service is good if a copy of the writ is posted upon the door of the premises, if a dwelling-house, or upon some other conspicuous part of the premises, not being a dwelling-house (ix. 8).

§ 9. *The Writ of Summons.—Leave to Issue.*—In case the defendant, or any one or more of the defendants, is or are out of the jurisdiction, and it is intended to serve the writ there, or to give notice of it there, the leave of the court or of a judge must first be obtained before the writ or summons can be sealed (*i.e.*, issued) at all (ii. 4). Such leave may (in an exceptional case)

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(*w*) *Ex parte Young, in re Young*, 19 Ch. Div. 124.

be obtained upon motion in court (x); but (in the ordinary case) the unsealed writ is to be left at chambers, and the judge's leave to issue the writ is then simply written on such unsealed writ (y).

§ 10. *The Writ of Summons.—Leave to make Substituted Service of, or to give Notice in lieu of Service of.*—

Where personal service can be effected, but for some reason or other cannot be promptly effected, the plaintiff must obtain from the court or a judge (*i.e.*, by motion in court or by summons at chambers) an order for substituted or other service, or for the substitution of notice for service (ix. 2). Such order is to be obtained on an affidavit, or affidavits, showing sufficient grounds for it (x.), and in particular that the defendant is in present communication with the proposed substitute, or (as the case may be) that the notice proposed to be given will come under the defendant's observation.

§ 11. *The Writ of Summons.—Leave to Serve out of Jurisdiction.*—Assuming the action to be one within the jurisdiction of the court (xi. 1) (z), if the plaintiff desires to serve writ upon, or to give notice thereof, to a defendant or defendants out of the jurisdiction, he must move in court for an order giving him leave so to do, upon an affidavit or affidavits showing in what place or country such defendant or defendants is or are or probably may be found, and showing whether or not such defendant or defendants is or are a British subject or British subjects, and showing also the grounds upon which the application is made (xi. 3); and in case the action is in respect of a contract or the breach thereof (xi. 1a), the affidavit or affidavits in support of the

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(x) *Young v. Brassey*, L. R. 1 Ch. Div. 277.

(y) *Stigand v. Stigand*, 19 Ch. Div. 460; and *disting. Laming v. Gee*, 10 Ch. Div. 715.

(z) *Bree v. Marescaux*, 7 Q. B. Div. 434.

motion must show also various circumstances influencing the judge's discretion regarding the convenience of having the action tried in England rather than in the foreign country (*a*). And, *nota bene*, if the defendant is a foreigner out of the jurisdiction, then the leave to be obtained is leave to give notice of the writ to him, and not leave to serve him with the writ itself (*b*).

§ 12. *The Writ of Summons.—Leave to Amend.*—The plaintiff's indorsement of claim on writ need not (at least in the first instance) set forth the precise ground of complaint or the precise remedy or relief to which the plaintiff considers himself entitled (iii. 2); and if the plaintiff should afterwards desire to extend his indorsement of claim to any other cause of action, or any additional remedy or relief, he may obtain an order from the court or a judge giving him leave to do so (iii. 2). This order is obtained on motion in court *ex parte*, and counsel's note indorsed on brief is to be initialed by the registrar, but no order need be drawn up (*c*). And this leave to amend writ is now not confined to amending the indorsement of claim, but extends to amending the writ generally (xxvii. 11), even as regards the addition of parties (*d*), but not, *semble*, the striking out of parties (*e*), unless the particular party is specified in the order giving leave (*f*). The amended writ is to be served like the original writ (*g*).

§ 13. *The Writ of Summons.—Order to Stay Pro-*

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(*a*) *Woods v. M'Innes*, 4 C. P. Div. 67; *Cresswell v. Parker*, 11 Ch. Div. 601; *Ex parte M'Phail*, 12 Ch. Div. 632; *Tottenham v. Barry*, 12 Ch. Div. 797; *Harris v. Fleming*, 13 Ch. Div. 208; *Bustros v. Bustros*, 14 Ch. Div. 849; *Fowler v. Barstow*, 20 Ch. Div. 240.

(*b*) *Westman v. Aktiebolaget*, 1 Exch. Div. 237; *Padley v. Camp-hausen*, 10 Ch. Div. 550; the Act 1873, s. 76, preserving for this purpose the C. L. P. Act, 1852, s. 19; and see *Bustros v. Bustros*, *supra*.

(*c*) *Mathias v. Mathias*, W. N. 1876, p. 214.

(*d*) *Ashley v. Taylor*, 10 Ch. Div. 768.

(*e*) *Elvov v. Vaughan*, W. N. 1879, p. 66.

(*f*) *Wymer v. Dodds*, 11 Ch. Div. 436.

(*g*) *The Cassiopeia*, 4 P. Div. 188.

*ceedings on.*—When the plaintiff indorses on his writ the name of a solicitor as his attorney, any defendant served therewith may (upon ascertaining from the solicitor that the name is used without authority) obtain a peremptory order to stay proceedings in the action (vii. 1). And conversely, when a solicitor has commenced an action in the name of a plaintiff without authority, the proper course is for the plaintiff to serve notice of motion on the defendant as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party (*h*).

Also, when the plaintiffs are partners suing by their partnership name, if they or their solicitors fail to furnish, on demand in writing, by or on behalf of any defendant, the names and places of residence of all the persons who are partners in the firm, the defendant may (upon summons at chambers supported by an affidavit of that failure) obtain an order to stay all proceedings in the action upon terms (vii. 2).

And so also the further proceedings in an action are very frequently stayed at this stage, upon the ground that the parties have agreed that the dispute in question should be referred to arbitration; and in such a case the onus of showing that the action should proceed is thrown on the plaintiff (*i*).

§ 14. *The Writ of Summons.—Order to Serve Particular Persons.*—Where husband and wife are co-defendants, the court or a judge may order the wife to be served with or without service on the husband (ix. 3).

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(*h*) *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Ch. Div. 310; *Nurse v. Durnford*, 13 Ch. Div. 764, following *Reynolds v. Howell*, L. R. 8 Q. B. 398.

(*i*) *Hodgson v. Rail. Pass. Assurance Co.*, 9 Q. B. D. 188.

Where an infant is defendant, the court or a judge may order that service made, or to be made, on him or her personally shall be deemed good service (ix. 4).

Where an infant or a lunatic is defendant, the court or a judge may order that the mode of service specified in § 8, *supra*, shall not be deemed good service on him or her (ix. 4 and 5).

§ 15. *The Writ of Summons.—Issue of Concurrent Writs.*—At the time of issuing the original writ, or within twelve months thereafter, the plaintiff may issue one or more concurrent writ or writs, *i.e.*, copies of the original writ, even the date being the same, with a seal impressed on each copy, such seal containing the word “Concurrent,” and also showing the date when such concurrent seal was impressed, *i.e.*, when such concurrent writ was issued. Every concurrent writ is in force only so long as the original writ is in force; but as the original writ, which, in the first instance, is in force for one year only (viii. 1), may be kept in force for an indefinite time beyond the year by successive renewals thereof (§ 16, *infra*), the concurrent writ may, *semble*, be correspondingly kept in force (vi. 1). A writ for service within the jurisdiction may be issued concurrently with one for service out of the jurisdiction (vi. 2), and *vice versa*,—the plaintiff being careful to comply with § 9, *supra*.\*

§ 16. *The Writ of Summons. — Renewals of.* — In case any defendant shall not have been served with the writ or concurrent writ, the plaintiff may apply before the expiration of the year for an order for renewal of the writ or concurrent writ, by summons in chambers, supported by an affidavit or affidavits

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\* A concurrent writ may be issued, *semble*, out of the District Registry, out of which the original writ issued, if that was so.

sufficiently showing that reasonable efforts have been made to serve such defendant with the writ or concurrent writ as the case may be, or showing other sufficient grounds for the order for renewal. The renewal, if made, is for six months; a second, third, &c., renewal may be ordered in the like manner and upon the like grounds at any time during the currency of the last preceding renewal. The plaintiff, after obtaining the order, leaves a memorandum directing the renewal at the Central Office, and the writ or concurrent writ is marked with a renewal seal, which seal shows the day of the month and the year of the renewal. The effect of renewing the writ or concurrent writ is to keep alive the action for all purposes, and (among these) to prevent the statutes of limitation becoming a bar to the remedy. Where, by an inadvertence that is excusable, the original year has run out before the first renewal of the writ, the court may (lvii. 6) make an order for renewal, notwithstanding the limit of one year, but the court cannot do so if the statutes of limitation have meanwhile operated (j).\*

#### SECTIONS 17-27.

#### THE APPEARANCE OF DEFENDANT.—THE FORMAL PROCEDURE WITH THE SUMMARY PROCEDURE INCIDENTAL THERETO.

§ 17. *The Appearance of Defendant.—Mode and Time of Entry of.*—The defendant enters an appearance at the Central Office.† The defendant appears by leaving

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(j) *Eyre v. Cox, in re Jones*, W. N. 1877, p. 38; *Doyle v. Kaufman*, 3 Q. B. Div. 7, 340.

\* The writ may be renewed in the District Registry (viii. 1), out of which it issued, if that was so (viii. 1).

† Where writ of summons issued out of District Registry, then if defendant resides or trades within the district, he is to enter his appearance in the District Registry (xii. 2); but if he neither resides nor trades there, he may enter his appearance in the District Registry or (at his own option) in the London Office (xii. 3); and if in such a case he enter his appearance in the London Office, he is to give notice

a slip or memorandum purporting to be an authority to the proper officer to enter the appearance; and upon receiving this memorandum, the officer enters same in the cause-book (xii. 11), and seals and delivers to the defendant a duplicate memorandum, and defendant on the same day sends to plaintiff or to his solicitor a written notice of his appearance, together with the duplicate memorandum (xii. 6b, April 1880). The normal period for appearing in the case of a defendant within the jurisdiction is the time specified in the writ, being usually eight days after service of writ of summons (see Form of Writ), and in the case of a defendant without the jurisdiction, being the time limited by the court in its order giving leave to serve writ (xi. 4, and see Form of Writ). But a defendant may appear before the expiration of the time specified, and also (but in that case not without peril) after the expiration thereof, at any time before judgment is delivered (xii. 15).

§ 18. *The Appearance of Particular Defendants.—Entry of.*—Where a partnership firm is the defendant or defendants, and the firm name is the name under which he or they are sued, he or they are to enter his or their appearance or appearances in his or their own individual names, one memorandum, however, sufficing in this case (as in other cases) for two or more defendants appearing by the same solicitor (xii. 12, 12a, 13).

§ 19. *The Appearance.—Leave for and Entry of in Particular Cases.*—If the writ of summons is indorsed with a claim for the recovery of land, the landlord (although not a defendant) may obtain, on summons at chambers or upon motion in court, upon an

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of that fact to the plaintiff or plaintiff's solicitor (xii. 6a), and such notice must be sent to the plaintiff's address for service within the district (xii. 6a, *Smith v. Dobbin*, 3 Exch. Div. 338).

affidavit of his actual or constructive possession, an order giving him leave to appear, and thereupon he leaves his memorandum of appearance at the office, and gives notice thereof to the plaintiff, and after that he is named as a defendant, and treated as such in all the subsequent stages of the action (xii. 18, 19, 20).

§ 20. *The Memorandum of Appearance.*—*Contents of.*—The defendant's solicitor's business address, or (if the defendant appears in person) the defendant's own residential address, is to be specified (xii. 7, 8); also, in either case, an "address for service," being some place within three miles from Temple Bar.\*

Where, in an action for the recovery of land, the landlord, being in possession by his tenant only, obtains leave to appear and defend, he is to state in his memorandum that he appears as landlord (xii. 19); and he may also (if the fact is so) state in his memorandum that he limits his defence to any (therein specified) part of the premises (xii. 21). If the memorandum of appearance should not state any limit to the defence, then such a landlord may state the limit (if any) to his defence in a notice intituled in the action and signed by himself or his solicitor, and which notice (if any) must be served on the plaintiff within four days after appearance (xii. 21).

§ 21. *The Appearance of Defendant.*—*Plaintiff's Motion to set aside.*—If the memorandum of appearance should not contain an "address for service," it cannot be entered at all; and if the address given is found to be illusory or fictitious upon due inquiry, the plaintiff may apply to the court or a judge for an order setting the appearance aside (xii. 9).

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\* If appearance is entered in District Registry, the address for service is to be within the District (xii. 7, 8).



§ 22. *The Appearance of Defendant.—Plaintiff's Affidavit of Service in lieu of.*—In a Chancery action, if a defendant fails to appear within the specified time (§ 17, *supra*), the plaintiff is thereupon to file an affidavit of service of writ (personal or substituted, as the case may be), or of notice in lieu of service (xiii. 2, 9); and upon that being done, the action in general proceeds as if that defendant had appeared (xiii. 9).\*

§ 23. *The Appearance of Infant (or Lunatic) Defendant.—Appointment of Guardian ad litem.*—But if the non-appearing defendant is an infant (or is a lunatic not so found), the plaintiff after the expiration of the time specified for appearance gives six clear days' notice of his intention to apply to the court for the appointment of a guardian *ad litem* to such infant (or lunatic),—such notice being served in the case of the infant (or lunatic) upon or at the dwelling-house of the person who was in charge of him when the writ of summons was served, and being further served in the case of the infant (when not in charge of his father or guardian) upon or at the dwelling-house of his father or guardian (if any) (xiii. 1). The application for the appointment of a guardian *ad litem* is in each case made upon motion, supported with an affidavit of the fitness of the proposed guardian. The plaintiff takes this course only where the person in charge of the infant (or lunatic) fails to enter an appearance; because if such person should enter an appearance, then he should himself go on to obtain, upon petition of course or upon motion, the appointment of the guardian *ad litem*; and at any rate, the plaintiff need not in such a case apply for the appointment of any guardian until the time for defendant putting in his defence; and the guardian *ad litem* to be appointed on plaintiff's applica-

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\* In exceptional actions, the plaintiff may sign judgment (final or interlocutory, or both final and interlocutory) for defendant's default of appearance. See Sects. 75-88, regarding JUDGMENTS, *infra*.

tion may (failing any friend of the defendant) be the solicitor to the Suitors' Fee Fund.

§ 24. *The Appearance.*—*Summons to Interplead and Proceedings thereon.*—After a defendant has appeared to a writ of summons, and at any time before he delivers his statement of defence, he may (if he is in no way interested in, otherwise than as being the custodian of, the subject-matter of the litigation) take out an interpleader-summons, and obtain on such summons (supported by an affidavit of his own absence of interest in, and some third person's claim to, the subject-matter of the litigation) an order calling upon such third person to appear and state the nature and particulars of his claim, and staying meanwhile all proceedings in the action (i. 2, and 1 & 2 Will. IV., c. 58, s. 1); and in the result, the judge (or master) may order such third person (appearing to the summons) to litigate his claim either as a defendant to the action or as a defendant to some other action, or as a party to some issue designed to determine his right (*k*), or the judge (or master) may order such third person (not appearing to the summons) to be barred of all claim as against the defendant (liv. 2*a*, Nov. 1878, and 1 & 2 Will. IV., c. 58, s. 3). In cases where the third party appears to the summons, the judge (or master) may also in all cases (with the consent of the plaintiff and such appearing third person), summarily dispose of the question between them (3 & 4 Will. IV., c. 38, s. 1), and the judge may also in all cases where the subject-matter is trivial (at the request either of the plaintiff or of such appearing third person), summarily determine the question (23 & 24 Vict., c. 126, s. 14); in which latter case, as also where the parties have consented to the judge's final determination, there is no appeal from the judge's summary decision (23 & 24

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(*k*) *Hamlyn v. Betteley*, 6 Q. B. D. 63.

Vict., c. 126, s. 17 (l); but, of course, where there has been an issue formally tried and decided, and no such consent as aforesaid, there is an appeal here as in other cases (m).

*Nota Bene.*—The sheriff is often obliged to take out an interpleader summons, e.g., when he proceeds to enforce execution on the judgment obtained in the action, and finds that the goods seized according to the directions of the judgment creditor are claimed by some third person as his. The sheriff, remaining in possession, proceeds forthwith to take out an interpleader-summons in the action, and the third person is then required to make out his title to the goods. The proceedings on this interpleader are like the proceedings upon the ordinary interpleader-summons (n).

§ 25. *The Appearance.*—*Summons to obtain Leave to appear under Summary Procedure on Bills of Exchange Act, 1855.*—When an action was commenced on a bill of exchange or promissory-note within six months after due, the writ of summons (with which the action commenced) used to direct (in effect) the defendant to obtain leave to appear, and also to appear, to the writ within twelve days after service thereof upon him (Form, Schedule A., to Act 1855). Unless the defendant could show some defence to the action on the merits, he would not get leave to appear (o), and so final judgment might have been entered against him after the twelve days; but if he succeeded in obtaining (within the twelve days) leave to appear (upon showing some such defence as aforesaid), and if he did also thereupon appear within the time limited for his appearance to the writ, then in its other stages

(l) *Dodds v. Shepherd*, L. R. 1 Exch. Div. 75; *Turner v. Bridgett*, 9 Q. B. D. 55; but see *Ex parte Streeter, in re Morris*, 19 Ch. Div. 216.

(m) *Witt v. Parker*, 46 L. J. Q. B. 450; and see *Withers v. Parker*, 4 H. & N. 810.

(n) *Wright v. Redgrave*, 11 Ch. Div. 24.

(o) *Girvin v. Grape*, 13 Ch. Div. 174.

the action used to proceed like any other action in the High Court (liv. 2; xxxv. 4) (*p*). But now this mode of proceeding is abolished (ii. 6*a*, April 1880), and in lieu thereof the plaintiff may issue writ and specially indorse same in the usual way, and defendant appears thereto without leave, but must in due course obtain leave to defend (§ 44*a*, *infra*).

§ 26. *The Appearance.—The Consolidation of Actions.*  
—Where in the same division of the court there are several pending actions instituted by the same plaintiff or plaintiffs against divers defendants,—then, if the question or questions in dispute are substantially the same in all the actions (and, consequently, the evidence in proof or disproof of the question or questions, when of fact, is substantially the same), the court will, upon the application of the divers defendants, or of such of them as have appeared, and so soon as they have appeared, order the several actions to be consolidated (li. 4). In the consolidation-order, the applicant-defendants jointly and severally undertake to abide by the verdict or judgment in the consolidated action; but this undertaking does not, of course, interfere with these defendants' right of moving to set aside the verdict, or of moving by way of appeal from the judgment. The order of consolidation, although binding on all the applicant-defendants, is not binding on the plaintiff strictly speaking, but it is binding upon him practically, that is to say, after the consolidation-order the plaintiff must proceed (at least in the first instance) to verdict or judgment in the consolidated action, and as he may after verdict move for a new trial, and after judgment move by way of appeal therefrom in the consolidated action, he will seldom desire (where the verdict or judgment is against him) to do otherwise than adopt one or other of these two courses, although

strictly speaking he may (if he choose), after verdict and judgment in the consolidated action, proceed in all or any of the other actions separately.

*Nota Bene.*—That the consolidation-order is made only where it is the same plaintiff or plaintiffs in each of the divers actions; and in the converse case, that is to say, when the plaintiffs are divers, and the defendant or defendants only are the same in the divers actions, no consolidation-order is made, but instead thereof the court will, on the application of the plaintiffs (or of such of them as choose to apply), make an order which is in effect a consolidation-order, that is to say, the court will select one (or more) of the divers actions as a test-action (or test-actions), and the plaintiffs undertaking to try these selected actions and to abide by the result therein in all the other actions, the court will (in its discretion) allow for taking the next step in these other actions such an extension of time as will permit the selected actions to be first tried (q).

§ 27. *The Appearance.—The Transfer of Actions.*—An action may, at any stage, be transferred from any one division to any other division, or, instead of being transferred, it may be retained in the division, or before the judge to or before whom or which it has been (although improperly) assigned or commenced (Act 1873, § 36; Act 1875, § 11); the order of transfer is made by the division (or judge thereof) in which (or in whose name) the action is entitled; but the order is not obtained as a matter of course, quite the contrary (r); and the order being once made, the president of the proposed transferee division (i.e., the Lord Chancellor in the Chancery Division and the respective chiefs in the Common Law and Probate Divisions)

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(q) *Amos v. Chadwick*, L. R. 4 Ch. Div. 869; 9 Ch. Div. 459; *Robinson v. Chadwick*, 7 Ch. Div. 878.

(r) *Storey v. Waddle*, 4 Q. B. Div. 289.

either assents thereto (in which case the order of transfer operates an effectual transfer), or dissents therefrom (in which case the order of transfer becomes a nullity, and the proposed transfer not being in fact made, although the order is made, the action remains in the division (and with the judge) in which (or in whose name) it was originally entitled) (s).\*

Likewise, after a decree has been made in an administration action in the Chancery Division (or in a winding-up proceeding in that division), the judge who has made the decree (or his successor in office) may, without any other judge's consent, and even against the will of the parties, order to be transferred before himself any action pending in any other division by or against the executors or administrators of the testator or intestate whose assets are being administered in the administration action (or by or against the company whose assets are being wound up) (li. 2a).

[Also, an action commenced and pending in one Common Law division, and the trial of which should have been heard before a judge of another Common Law division, was from that time to be transferred to such other division (v. 4a, March 1879).]

## SECTIONS 28-39.

THE PARTIES TO THE ACTION.—THE FORMAL PROCEDURE WITH THE SUMMARY PROCEDURE INCIDENTAL THERETO.

### § 28. *The Parties to the Action.—Choice of Defen-*

(s) *Humphreys v. Edwards*, 45 L. J. Ch. Div. 112.

\* The Lord Chancellor, for the convenience of the administration of justice, may transfer from one division to another any action or actions, subject to the president of the transferee division assenting thereto, and he is not likely to dissent therefrom (li. 1); and the Lord Chancellor, for the like purpose, may make the like transfer from one judge in the Chancery Division to another judge in the Chancery Division (li. 1); and the transfer in the last-mentioned case may be for the purpose of trial, or of trial and further trial only, or generally (li. 1a; *Lloyd v. Jones*, 7 Ch. Div. 390).

*dants*.—The plaintiff may join as defendants all or any of the persons severally, or jointly and severally, liable on any one contract (xvi. 5); also, all or any of the persons, some or one of whom (he believes, but is uncertain which) is or are liable, whether on contract or in tort (xvi. 6).

§ 29. *The Parties to the Action.—Joinder of Plaintiffs*.—All persons may be joined as plaintiffs in whom, whether jointly, severally, or alternatively, the right to the relief claimed is alleged to exist (xvi. 1).

§ 30. *The Parties to the Action.—Misjoinder and Non-joinder*.—The misjoinder of plaintiffs is no longer fatal to the action on the merits, and need not even be amended (xvi. 1); but the plaintiff who is successful may have to pay to the defendant or defendants the extra costs (if any) occasioned to the latter by the misjoinder (xvi. 1). The non-joinder of a plaintiff, or the selection of the wrong plaintiff, if either has arisen through a *bond fide* mistake, although the mistake should be of law (*t*), will be remedied, and a proper plaintiff or plaintiffs will be ordered to be added or substituted, as the case may require (xvi. 1), the new plaintiff or plaintiffs consenting (xvi. 13) (*u*). The like remarks hold good, *mutatis mutandis*, regarding the misjoinder and non-joinder of defendants, or a defendant (xvi. 3, 5, 6, 13), but without any consent on the part of the new defendant or defendants (xvi. 13); and no defendant may object on the ground of multifariousness (xvi. 4) (*v*).

§ 31. *The Parties to the Action.—Representative Parties*.—An unknown heir-at-law or unascertained

(*t*) *Duckett v. Gover*, 6 Ch. Div. 82; *Mason v. Harris*, 11 Ch. Div. 97.

(*u*) *Turquand v. Fearon*, 4 Q. B. D. 280; *Sheehan v. Great Eastern Railway Co.*, 16 Ch. Div. 59; *Long v. Crossley*, 13 Ch. Div. 188; *Cox v. James*, 19 Ch. Div. 55.

(*v*) *Child v. Stenning*, 7 Ch. Div. 413; 11 Ch. Div. 82; *Lovess v. Smith*, 15 Ch. Div. 655.

next of kin may be represented in any action involving a question of construction that might affect him or them by a nominee defendant (xvi. 9a).

Trustees, executors, and administrators represent their respective beneficiaries, whether suing or being sued (xvi. 7), and that even under the Partition Acts (*w*); but the court may at any time direct the beneficiaries to be joined as parties; and as regards an administrator, he must usually be a general administrator, and not merely an administrator *ad litem* (*x*). The court appears occasionally, but rarely, to dispense with the general administrator or the executor, when it already has the beneficiaries before it (*y*).

One or more persons out of a numerous class having the same or the like interest may sue or be sued, or may be ordered to defend, on behalf of the entire class (xvi. 9).

In an administration action, or in an action for the execution of the trusts of a deed, one beneficiary may sue or be sued as representing all the beneficiaries of like character (xvi. 11), the beneficiaries represented by him receiving merely notice of the decree when made (15 & 16 Vict., c. 86, ss. 42, 44) (*z*).

§ 32. *The Parties to the Action.*—*Infants and Lunatics.*—Infants sue by their next friends (xvi. 8), and defend by their guardians *ad litem* (xvi. 8), but are made defendants in their own proper names, and without the addition of the guardian's name.

(*w*) *Simpson v. Denny*, 10 Ch. Div. 28.

(*x*) *Dowdeswell v. Dowdeswell*, 9 Ch. Div. 294.

(*y*) *Hunter v. Young*, W. N. 1879, p. 99; *Curtius v. Caledonian Fire and Life Assurance*, 19 Ch. Div. 534.

(*z*) *Wingrove v. Thompson*, 11 Ch. Div. 419; *Lovesey v. Smith*, 15 Ch. Div. 655; *In re Cross*, *Harston v. Tenison*, 20 Ch. Div. 109.



Lunatics so found sue by their committees, and are sued by their committees, the committee and the lunatic being both made co-plaintiffs or co-defendants, as the case may be (xviii.); lunatics not so found sue by their next friends and defend by their guardians *ad litem* (a), but are made defendants in their own proper names, and without the addition of the guardian's name, precisely as in the case of infants (xviii.)

§ 33. *The Parties to the Action.—Married Women.*—Married women sue by their next friends (xvi. 8), and are sued by themselves and their husbands; but, with the leave of the court or a judge (b), and upon such (if any) terms as to giving security for costs as the court or a judge may direct, married women may sue without a next friend, and may defend without their husbands (xvi. 8). Where the property is separate estate, the rule is the same whether the married woman is plaintiff or defendant (c); but as regards earnings, &c., under Married Women's Property Act, 1870, married women are by that Act enabled to sue alone (§ 11), but they were not thereby (although now by the Married Women's Property Act, 1882, they have been) enabled to be sued without their husbands (d).

§ 34. *The Parties to the Action.—Partners and Landlords.*—Partners may sue and be sued in their partnership name (xvi. 10); a single person describing himself by a partnership name *must* sue in his own proper name (xvi. 10a), but *may* be sued either in his own proper name or in the assumed partnership name (xvi. 10a) (e). Where a landlord has obtained leave

(a) *Vane v. Vane*, L. R. 2 Ch. Div. 124.

(b) *Noel v. Noel*, 13 Ch. Div. 510; *Kingsman v. Kingsman*, 6 Q. B. D. 122; *Brown v. North*, 9 Q. B. D. 52; *Schjott v. Schjott*, 19 Ch. Div. 94.

(c) *Roberts v. Evans*, 7 Ch. Div. 830; but see *Williams v. Mercier*, 9 Q. B. D. 337.

(d) *Hancocks v. Lablache*, 3 C. P. Div. 197.

(e) *Jackson v. Litchfield*, 8 Q. B. Div. 474.

to appear and defend (xii. 18, 19, 20), he is to be named as a party in all subsequent pleadings and documents (xii. 18, 19, 20).

§ 35. *The Parties to the Action.—Multifarious Defendants.*—Although, as we have seen (§ 30, *supra*), a defendant cannot object on the ground of multifariousness, still he may apply to the court or a judge by motion or summons for such order as may appear just to save his being embarrassed or put to needless expense in his defence of the action (xvi. 4).

§ 36. *The Parties to the Action.—Adding or Striking out Parties.*—In cases of the misjoinder or non-joinder of plaintiffs or defendants referred to in § 30, *supra*, if it becomes necessary to apply to the court or a judge to add or to strike out a plaintiff or a defendant, either party may apply by motion or summons before the trial or in a summary way at the trial for the requisite order in that behalf (xvi. 14); thus a defendant, added for discovery only, was ordered to be struck out (*f*); also, a plaintiff whose joinder was embarrassing has been struck out (*g*). Where a defendant is so added, the plaintiff is to forthwith issue an amended writ of summons and to serve such defendant with it (xvi. 15) in the usual way (*i.e.*, either personally, or by substitute, or by notice in lieu of service); and if the statement of claim has already been delivered, the plaintiff is likewise to amend his statement of claim, and to deliver the statement of claim as so amended to such added defendant, either at the same time with the amended writ or within four days after the added defendant has put in his appearance to the amended writ (xvi. 16); for, of course, such defendant must put in an appearance to the amended writ, and that within the usual period after service of amended writ (§ 17, *supra*),

(*f*) *Wilson v. Church*, 9 Ch. Div. 552.

(*g*) *Smith v. Richardson*, 4 C. P. Div. 112; *Emden v. Carte*, 17 Ch. Div. 169.

otherwise the plaintiff may proceed as for default of appearance in the usual way (§ 22, *supra*); and in any of these cases the court will give special directions, where such directions are necessary (*h*).

§ 37. *The Parties to the Action.—The Secondary (or Cross) Parties.*—It sometimes (and in fact often) happens that a defendant, whether or not liable to the plaintiff, may have, in respect either of the same or of some other ground of action, a remedy (of some sort or other) against the plaintiff,—in fact, some counter-claim by the primary defendant against the primary plaintiff, that is to say, against the primary plaintiff either alone by himself or in conjunction with others—such others being or not being already co-plaintiffs or co-defendants in the original action. In any of the cases specified, the primary defendant may, as a secondary plaintiff, claim relief against the primary plaintiff (either alone or in conjunction with others) as a secondary defendant (or secondary defendants), that is to say, such relief as might have been claimed against such primary plaintiff (either alone or in conjunction with others) if made a defendant (or defendants) to an independent action at the suit of the primary defendant (Judicature Act, 1873, s. 24, sub-sect. 3) (*i*). And in any of the cases specified, the primary defendant is spared instituting against the primary plaintiff (either alone or in conjunction with others) an independent action (unless the court should direct him to do so), and merely adds a counter-claim to his defence, delivering his defence and counter-claim to the plaintiff (alone or in conjunction with the others, being already parties), or serving same indorsed with the direction to appear that is usual in a writ of summons upon the others (if any), not being already parties to the original

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(*h*) *Austen v. Bird*, W. N. 1881, p. 129.

(*i*) *Turner v. Hednesford Gas Co.*, 3 Exch. Div. 145; *Bagot v. Easton*, 11 Ch. Div. 392.

action; and all persons so served are to appear as upon service of a writ of summons (xxii. 5-7); and all defendants to the counter-claim, i.e., all the secondary defendants, may plead thereto in manner hereinafter mentioned; and the primary defendant, if successful on his counter-claim, obtains relief as a secondary plaintiff in the same action (*j*). And as regards a successful counter-claiming defendant's costs, see §§ 127-129, *infra*.

§ 38. *The Parties to the Action.—The Subsidiary Defendants.*—It sometimes (and, in fact, often) happens, Firstly, that a defendant (if found liable to the plaintiff) may have in respect of the same ground of action a REMEDY OVER (of some sort or other) against some other or third person,—such other or third person being *subsidiarily* liable; or, secondly, that either the plaintiff or the defendant may desire that the determination of some question in the action between the plaintiff (or plaintiffs) and the defendant (or defendants) should be a determination of that question binding also as between them or either of them on the one hand and some other or third person or persons on the other hand,—such other or third person or persons being *subsidiarily* interested therein or probably or possibly affected thereby. And in either of these two cases (*k*), but especially in the case first mentioned (remedy over), the third person or persons (or one or some of them) may or may not be already parties (either as plaintiffs or as defendants) in the original action (§§ 28, 29, *supra*).

Now, firstly, if the defendant to the original action (and who is hereinafter called the primary defendant) claims some remedy over as aforesaid, he is spared

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(*j*) *Hodgson v. Mochi*, 8 Ch. Div. 569; *Young v. Kitchen*, 3 Exch. Div. 127.

(*k*) *Bright v. Marner*, 11 Ch. Div. 394 n.

instituting an independent action (unless the court should direct him to do so), and as regards such of the other or third persons as are already parties, he merely delivers his defence to them (*l*); but as regards such of the other or third persons as are *not* already parties, he obtains the leave of the court to issue, and then issues a notice of his claim (in the form No. 1 of Appendix B., Judicature Acts, 1873-75), stamped with the seal with which writs of summons are sealed (xvi. 18); but this leave to issue third party notice is not a matter of course (*m*); and he then files a copy of such notice, and also serves same, exactly as if it were a writ of summons, and (unless the court or judge otherwise orders) the service is to be made within the time limited for delivering his defence. Together with the notice, he is to serve also a copy of the statement of claim (if any), or of the writ of summons (if there is no statement of claim). The third person so served, if he desires to dispute the plaintiff's claim against the primary defendant, may enter an appearance within eight days after service of the notice upon him, or (with the leave of the court) after the expiration of such eight days; and if he fail to appear, then he is deemed to submit to the judgment obtained by the plaintiff against the primary defendant, whether such judgment is obtained by consent or not (xvi. 20), but if he appears, and the appearance is within the specified eight days (or, *semble*, after their expiration), then the person who issued the notice is to apply to the court or a judge for directions generally (xvi. 21), and upon such application and among such directions, the court or a judge may give the third person so served and appearing liberty to defend the action, with all proper incidental directions (xvi. 21)

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(*l*) *Shepherd v. Beane*, L. R. 2 Ch. Div. 223; *Butler v. Butler*, 14 Ch. Div. 329.

(*m*) *Associated Home Company v. Whichcord*, 8 Ch. Div. 457; *Wye Valley Railway Co. v. Hawes*, 10 Ch. Div. 489.

(*n*); And at the trial the court is to give to such primary defendant such relief against the subsidiary defendants (or any of them) as the primary defendant might have obtained in an independent action instituted against them (Judicature Act, 1873, s. 24, subsect. 3); *sed quære*, whether this last provision is workable (*o*).

And, secondly, if either the plaintiff or the defendant to the original action (and who is hereinafter called the primary plaintiff or primary defendant) desires such determination as aforesaid of any question in the action, he is spared instituting an independent action (unless the court should direct him to do so), and as regards such of the other or third persons as are already parties, and as regards also such of the other or third persons as are *not* already parties, he merely obtains from the court or a judge a form of notice (to be settled by the court or judge), and the plaintiff is to serve such notice upon or deliver the same to all the other or third persons, or such of them as the court or a judge may direct, at such time and in such manner as the court or a judge shall direct (xvi. 19); the form of notice will (*semble*) direct such of the other or third persons as are not already parties to appear to the original action; and after their appearance (or, *semble*, if they do not appear, or there are none of them to appear), then upon the application of the plaintiff, the court or a judge will give general directions regarding the determination of the question (xvi. 21). If the court refuses to give any directions in the matter, the action as regards such third parties is at an end (*p*).

### § 39. *The Parties.*—*Persons made Parties by Re-*

(*n*) *Bagot v. Easton*, 11 Ch. Div. 392.

(*o*) *Trelean v. Bray*, 1 Ch. Div. 176; *The Cartburn*, 5 P. Div. 59.

(*p*) *Schneider v. Bath*, 8 Q. B. D. 701; and see *Ex parte Young*, in *re Kitchen*, 17 Ch. Div. 668.

*vivor*.—In case any party to an action dies, marries, or becomes bankrupt, and thereby some devolution of estate or interest arises by operation of law, the action is not to be deemed abated (l. 1) (g); but the court may order (as the case may require) the personal representative, or the husband, or the trustee, or other the successor in interest, to be made (if necessary) a party to the action or to be served with notice thereof, and the court may also otherwise order as may be just (l. 2) (r). The order is made on summons or motion supported by an affidavit of the event occasioning the devolution of interest (l. 4); and, *semble*, the order is (in the case of a sole plaintiff deceased) on the voluntary application of the party seeking to be added (s); and no compulsory order can be obtained against him, *sed quære*; also, revivor by a trustee in bankruptcy is not permitted as a matter of course (t); also, liberty may be given to the plaintiff in one administration action to use the name of the plaintiff in another administration action, where such latter plaintiff is a bankrupt (u). And where, pending the action, there is any devolution of interest by act of the party, the action is not to be deemed abated (l. 1), but may be continued against the successor in interest (l. 3); and the requisite order may be obtained upon an *ex parte* application (by summons or motion) supported by an affidavit of the fact of the devolution of interest (l. 4). The like procedure applies where any person interested comes into existence after writ issued, his subsequent coming into existence operating, in fact, as a devolution of interest (l. 4) (v).

The order in all the foregoing cases is called an

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(g) *Eldridge v. Burgess*, 7 Ch. Div. 411.

(r) *Twyecross v. Grant*, 4 C. P. Div. 40; *Boynston v. Boynston*, 9 Ch. Div. 350; 4 App. Ca. 733; *Emden v. Carter*, 17 Ch. Div. 169, 768.

(s) *Wingrove v. Thompson*, 11 Ch. Div. 419.

(t) *Barter v. Dubeux*, 7 Q. B. D. 413.

(u) *In re Hopkins, Dowd v. Hawtin*, 19 Ch. Div. 61.

(v) *Haldane v. Eckford*, W. N. 1879, p. 80.

order of revivor; and the order of revivor is to be served on the continuing party or parties, and also upon the new (or substitutionary) parties or party to the action, and becomes binding as from the time of service on the party served therewith (l. 5), and he takes up the action at its then stage (*w*), subject, nevertheless, to be discharged upon application at any time within twelve days after service (l. 6), or (in case of effective disability) within twelve days after the removal of such effective disability \* (l. 7).

An action may be revived, although for costs only (33 & 34 Vict., c. 28, s. 19).

But there cannot be (nor need there be) any such order of revivor, if the cause of action do not survive or continue as regards the particular party (l. 1) (*x*).

*Before* judgment a defendant's successor cannot apply to add himself as a defendant by order of revivor, although *after* judgment he may do so, Order I. rules 1-5 being subject to the old Chancery Practice (15 & 16 Vict., c. 86, s. 52, and Consol. Order xxxii.) (*y*).

## SECTIONS 40-59.

### THE PLEADINGS.—THE FORMAL PROCEDURE WITH THE SUMMARY PROCEDURE INCIDENTAL THERETO.

§ 40. *The Pleadings.—Succession of, and Times for.*  
—As a general rule, the plaintiff within six weeks (ex-

(*w*) *Chorlton v. Dickie*, 13 Ch. Div. 160; and see *Curtis v. Sheffield*, 20 Ch. Div. 398.

\* Effective disability is infancy or unsoundness of mind, when the infant or unsound person has neither a guardian *ad litem* nor (being a lunatic so found by inquisition) a committee. Coverture is not an effective disability as regards revivor of actions.

(*x*) *Lloyd v. Dimmack*, 7 Ch. Div. 398.

(*y*) *Ranson v. Potton*, 17 Ch. Div. 767.



tendible) after defendant's appearance (xxi. 1), delivers to the defendant a statement of claim (which is the First Pleading properly so called), and the defendant thereafter, and within eight days (extendible) after the delivery of the statement of claim (xxii. 1), delivers to the plaintiff his defence (if any) to the claim, and which defence may or may not be accompanied with a counter-claim (xix. 3) against the plaintiff (either alone or in conjunction with other persons, whether already parties to the action or not); and the plaintiff thereafter, and within three weeks (extendible), and any third party thereafter, and within eight days (extendible) after the delivery of the Statement of Defence (xxii. 8, and xxiv. 1), delivers to the defendant his reply. Usually the reply ends the pleadings; and no pleading subsequent to reply (other than a simple joinder of issue) can be pleaded without leave of the court or a judge, and then only upon terms (xxiv. 2). The time for a simple joinder of issue subsequent to the plaintiff's reply is four days (xxiv. 3).

§ 41. *The Pleadings.—Times for Delivering, Extensions of.*—Upon summons at chambers to show cause why a [specified] extension of time should not be allowed for delivering any pleading (lvii. 6), an extension of the prescribed time may be obtained; and the order when made is to be forthwith drawn up and served,—the costs of the application being costs in the action (August 1875, rule as to costs, 22). This first extension of time (and, *semble*, any subsequent extension) may and should be consented to, and no order obtained (2). Any second or other subsequent extension of time may be obtained, but only upon sufficient grounds, the costs being usually reserved, or not made costs in the action.

§ 42. *The Pleadings.—General Character of.*—Every

pleading is to be as brief as the nature of the case will admit (xix. 2), any undue length being visited with costs. A counter-claim is to have the effect of a statement of claim in a cross action (xix. 3). Every pleading (other than a simple joinder of issue, and other than a demurrer) is to state facts in a simple and natural but accurate manner, and is not to state evidence (xix. 4) or admissions (*a*). Every statement of claim, and also every counter-claim, is to state specifically the relief wanted, but may also ask for general relief (xix. 8). Separate and distinct facts, made the basis of separate and distinct claims, are to be kept separate in every statement of claim and counter-claim (xix. 9). Every defence to a statement of claim and every reply to a counter-claim is to deal specifically with every allegation of fact that is not admitted, and a mere general denial is not sufficient (xix. 20) (*b*); excepting that a simple joinder of issue operates as a general denial of every material allegation of fact in the pleading upon which issue is joined, other than such allegations as the joinder of issue expressly excepts (xix. 21). Denials of fact are to be substantial and not evasive,—denials *modo et forma* (if standing alone) being deemed evasive (xix. 22) (*c*). No pleading (unless by way of amendment) is to be inconsistent with a previous pleading of the same party (xix. 19); and the relief claimed must also be consistent (*d*).

§ 43. *The Pleadings.—Particular Rules regarding.*—Every pleading containing less than ten folios of seventy-two words each may be either printed or written, or partly

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(a) *Davy v. Garrett*, 7 Ch. Div. 473.

(b) *Boyd v. Nunn*, 7 Ch. Div. 284; *Collette v. Goode*, 7 Ch. Div. 842; *Rutter v. Tregent*, 12 Ch. Div. 758; *Williamson v. L. & N. W. Railway Co.*, 12 Ch. Div. 787.

(c) *Tildesley v. Harper*, 7 Ch. Div. 403; 10 Ch. Div. 393.

(d) *Bagot v. Easton*, 7 Ch. Div. 1; *Newby v. Sharpe*, 8 Ch. Div. 39; *Cargill v. Bower*, 10 Ch. Div. 502; *Evans v. Davis*, 10 Ch. Div. 747.

one and partly the other (xix. 5 and 5a). Every pleading is to be delivered to the other party or his solicitor, and in case of a defendant who has not appeared, the pleading to be delivered to him is delivered by being filed (xix. 6). A counter-claim is to be so described, so as to distinguish it from a defence properly so called (xix. 10). Pleadings in abatement are abolished (xix. 11), and apparently a motion to amend compulsorily is now substituted; also, where formerly there would have been a new assignment, there is now to be amendment simply of the statement of claim (xix. 14).

Possession is a good plea, without adding title (xix. 15), (e) but the title must be added if the same be equitable merely, or the defence is on equitable grounds (xix. 15).

"Not guilty by statute" is a good plea; but it cannot (excepting by leave of the court or a judge) be joined with any other plea (xix. 16).

Special defences must be specially pleaded, *e.g.*, the statute of limitations (xix. 18), the statute of frauds (xix. 23), a release (xix. 18), and such like (f); but as regards the statute of limitations, where pleaded to the recovery of land, that defence may be taken by demurrer (g).

The effect of documents is to be pleaded, and not the very words (unless where, as in libel (h), the very words are material); fraud, malice, &c., are to be pleaded as facts simply, without showing the circum-

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(e) *Danford v. M'Anulty*, 6 Q. B. D. 645; and see *Lyell v. Kennedy*, 20 Ch. Div. 484.

(f) *Wakelee v. Davis*, 25 W. R. 60; *Callling v. King*, 5 Ch. Div. 660; *Shurdlow v. Cotterill*, 18 Ch. Div. 280.

(g) *Dawkins v. Lord Penrhyn*, 6 Ch. Div. 318; 4 App. Ca. 51.

(h) *Harris v. Warre*, 4 C. P. Div. 125.

stances from which they are inferred; nevertheless, fraud must still be pleaded with great particularity (i); so also notice (unless where the precise form or terms of the notice are material); so also the existence of a contract; so also the fact of a relation having subsisted between the parties (xix. 24, 25, 26, 27). Presumptions of law are not to be pleaded (xix. 28). Particulars may be obtained on summons, when the pleading is general (j).

§ 44. *The Pleadings.—The Statement of Claim.*—The plaintiff may unite in one statement of claim several causes of action (k), subject to the court or a judge, on the application of the defendant, directing them to be separately disposed of (xvii. 1, 8, 9),—*e.g.*, claims by or against husband and wife, with claims by or against either of them separately (xvii. 4); claims by or against an executor or administrator, as such, with claims (connected with the estate) by or against him personally (xvii. 5); and joint claims, with separate claims, by all, or some, or one of several co-plaintiffs against the same defendant (xvii. 6),—excepting, nevertheless, the two following cases, viz. :—

(1.) The plaintiff may not (unless by leave of the court or a judge) join with an action for the recovery of land any second cause of action other than a claim or claims in respect of arrears of rent, or mesne profits, or damages for breach of covenant relating to the same land or some part thereof (xvii. 2) (l); and,

(2.) The plaintiff may not (unless by leave as afore-said) join claims by him as a trustee in bankruptcy, with claims by him in any other capacity (xvii. 3).

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(i) *In re Rica Gold Washing Co.*, 11 Ch. Div. 36; *Redgrave v. Hurd*, 20 Ch. Div. 1.

(j) *The Rory*, 7 P. D. 117; *Augustinus v. Nerinsky*, 16 Ch. Div. 13.

(k) *Howell v. West*, W. N. 1879, p. 90.

(l) *Pilcher v. Hinds*, 11 Ch. Div. 905; *Gledhill v. Hunter*, 14 Ch. Div. 492.

Also, *nota bene*, there can be no such joinder of causes of action by way of counter-claim (*m*).

The plaintiff may deliver a statement of claim whether the defendant desires one or not, and even though the defendant expressly states he does not desire one (xxi. 1); and if the defendant expressly states that he desires one [or, *semble*, does not expressly state that he does not desire one], the plaintiff may (if his writ of summons was specially indorsed) give the defendant notice (marked like a statement of claim) to the effect that that endorsement is his statement of claim (xxi. 4).

§ 44a. *The Pleadings. — Leave to Defend.* — If the writ of summons is specially indorsed (under iii. 6) with the particulars of the debt or liquidated demand in money claimed in the action, the defendant, after appearing thereto, may by leave defend (xiv. 1, May 1877); *e.g.*, where the defendant is sued as a surety only (*n*). The defendant obtains this leave upon his showing cause against an application of the plaintiff upon summons supported with an affidavit that in his (plaintiff's) belief the defendant has no defence to the action. In order to obtain the leave, the defendant must, by affidavit or otherwise, show that he has a defence to the action on the merits (xiv. 1); and mere payment into court is not enough (*o*). The leave to defend may be granted as to part, and refused as to the rest of the claim (*p*). It is sufficient if the affidavit show a *prima facie* defence (*q*).

#### §. 45. *The Pleadings.—The Pleading next Subsequent*

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(*m*) *Macdonald v. Carington*, 4 C. P. Div. 28.

(*n*) *Lloyd's Banking Co. v. Ogle*, 1 Exch. Div. 262.

(*o*) *Crump v. Cavendish*, 5 Exch. Div. 211.

(*p*) *Dennis v. Seymour*, 4 Exch. Div. 80.

(*q*) *Beckingham v. Owen*, W. N. 1878, p. 215; *Wallingford v. Mutual Society*, 5 App. Ca. 685.

*to Statement of Claim.*—Upon seeing the statement of claim, the defendant must consider with himself what line of defence thereto he shall adopt,—assuming (of course) that he means to defend; and his choice of defences lies among these varieties, viz,—(1) A demurrer, (2) A plea, and (3) A defence properly so called. Now, whether he demur or whether he put in a plea, he is taken to admit (but for the purposes only of the demurrer or plea), the truth of all the allegations contained in the statement of claim,—and in the case of the demurrer, he denies their sufficiency in law, and in the case of the plea he admits their sufficiency in law, but avoids their effect by the new matter contained in his plea. But if he defend (otherwise than by plea or demurrer), he admits or not certain only of the allegations contained in the statement of claim, and denies or else expresses that he does not admit the allegations not admitted, thereby putting the plaintiff to the proof of those expressed to be not admitted (*r*), as well as of those denied, and adds or not other allegations of a contrary effect; and when he adopts this line of defence, he is said to put in a statement of defence properly so called, and with that statement of defence he may (if he so choose, and if it is proper that he should) conjoin also a counter-claim, taking care to expressly distinguish such counter-claim from his defence properly so called. We have therefore to consider in this place, and in the following order, the following varieties of pleading next subsequent to statement of claim,\* viz :—

(a.) The defendant's demurrer to plaintiff's statement of claim;

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(*r*) *Harris v. Gamble*, 7 Ch. Div. 877.

\* There may be a statement of defence even without any previous statement of claim (xxii. 2), at the option of defendant, but not so as to entitle plaintiff to require one (*Hooper v. Giles*, W. N. 1876, p. 10).

(b.) The defendant's plea to plaintiff's statement of claim ;

(c.) The defendant's defence to plaintiff's statement of claim ; and,

(d.) The defendant's defence and counter-claim to plaintiff's statement of claim.

§ 46. *The Pleadings.—The Defendant's Demurrer to Plaintiff's Statement of Claim.*—The defendant may demur to the plaintiff's statement of claim, or to any part of it setting up a distinct cause of action, on the ground that the facts therein alleged do not show any cause of action to which effect can be given by the court against the party demurring (xxviii. 1) ; and a demurrer for general want of equity still lies (s). The demurrer must express that it is to the whole action or else to some (and what ?) part (xxviii. 2) ; and it must state some ground in law for the demurrer, and same must not be frivolous (xxviii. 2).\*

§ 47. *The Pleadings.—The Defendant's Plea or other Defence Proper to the Plaintiff's Statement of Claim.*—Where the defendant does not demur, he may defend by stating one simple fact (*e.g.*, a release), in which case he is said to put in his plea in destruction of the cause of action ; or (where the defence is not of that simple character) he may defend by stating a succession of circumstances with or without (at the same time) denying or expressing that he does not admit the whole [or certain specified parts] of the statement of claim, in which case he is said properly to defend. The latter of these two modes of defence corresponds to and may be called a *traverse* or *plea in denial* ; and the former of them is a *plea in confession and avoidance*, or

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(s) *Bidder v. M'Lean*, 20 Ch. Div. 512.

\* For demurrers to other pleadings, see Tabular Statement at the end of this Epitome of the Practice.

a plea in justification and excuse, or a plea in satisfaction and discharge.

§ 48. *The Pleadings.—The Defendant's Plea of Payment into Court.*—If the defendant pay money into court in satisfaction of the cause of action, or of any part thereof,—a mode of proceeding which he may adopt, if he so choose, in any action brought to recover a debt or damages,—then,

(a.) If the payment is made before delivering his defence, he is to notify to the plaintiff the fact of such payment, specifying in respect of what claim the payment is made (xxx. 2), in which case the plaintiff may, within four days after notice, accept same in satisfaction thereof, and notify his acceptance thereof to the defendant, and after that, if the payment is specified to be in respect of the entire action, the action is at an end, excepting as regards costs (t) (regarding which see §§ 127–129, *infra*); but if the payment is specified to be in respect of some part or parts only, and not in respect of the entire cause of action, then the action proceeds as to the remaining part or parts of the action (xxx. 4); and,

(b.) If the payment is made at the time of delivering the defence, then the defendant is to plead same in his defence, specifying in such defence the claim or cause of action in respect of which the payment is made (xxx. 1), in which case the plaintiff may, before delivering any reply, accept same in satisfaction thereof, and notify that fact to the defendant as aforesaid, and after that the action proceeds or not as aforesaid. And the defendant along with the plea of payment into court may (without any leave first obtained) plead other defences of an independent and *prima facie* in-

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(t) *Greaves v. Fleming*, 4 Q. B. Div. 226; *Buckton v. Higgs*, 4 Exch. Div. 174.



consistent character (*u*). Of course, the defendant (if he should succeed in the action) will get his money out of court again, if the plaintiff has not already taken it out (*v*); but the plaintiff should take it out, and can keep it, whatever the result of the action (*w*).

§ 49. *The Pleadings.—The Defendant's Defence and Counter-claim to the Plaintiff's Statement of Claim.*—Where the counter-claim raises questions between the defendant and the plaintiff, along with any other person or persons, the defendant is to add to the title of his defence a further title setting forth in such further title the names of all the parties to the counter-claim, like as if the same were a cross action (xxii. 5). The counter-claim must as a pleading conform to the general rules of pleading (§ 42, *supra*), and also to the particular rules of pleading (§ 43, *supra*); and merely referring in the counter-claim to the allegations contained in the statement of defence properly so called is dangerous, as being likely to prove insufficient (*x*).

§ 50. *The Pleadings.—Counter-claim, Application to Exclude.*—The plaintiff in the original action, or any party to the counter-claim, may at any time before delivering his reply (xxii. 9) apply for an order excluding the defendant's counter-claim (*y*); upon the ground that the same should properly be raised in an independent action (*z*); and further, the plaintiff may at any time before trial of the action (xix. 3) apply

(*u*) *Berdan v. Greenwood*, 26 W. R. 992; *Spurr v. Hall*, 2 Q. B. D. 615; *Hawkesley v. Bradshaw*, 5 Q. B. D. 302; *Heatley v. Newton*, 19 Ch. Div. 326.

(*v*) *Yorkshire Banking Co. v. Beatson*, W. N. 1879, p. 96.

(*w*) *Emden v. Carte*, 19 Ch. Div. 311.

(*x*) *Crowe v. Barnicot*, 25 W. R. 789; 6 Ch. Div. 753; but see *Lees v. Patterson*, 7 Ch. Div. 866; *Birmingham Estates Co. v. Smith*, 13 Ch. Div. 506.

(*y*) *Hodson v. Mochi*, 8 Ch. Div. 569; *Huggons v. Twedd*, 10 Ch. Div. 359; *Birmingham Estates Co. v. Smith*, 13 Ch. Div. 506.

(*z*) *Barber v. Blaisberg*, 19 Ch. Div. 473.

for an order refusing to the defendant permission to avail himself of his counter-claim in that action (a).

§ 51. *The Pleadings.—Defending in divers manners in one Defence.*—A defendant may demur to part of a statement of claim, and plead to the other part or parts, in which case he must combine both pleadings in one document (xxviii. 4) (b). A defendant may even demur to the whole (or any part) of a statement of claim, and at the same time and in the same document, but only by leave first had and obtained of the court or a judge, plead to the same statement (or some part of it) (xxviii. 5).

§ 51a. *The Pleadings.—Pleading after Demurring.*—The court when asked to grant leave to plead and demur at once to one and the same matter, may, instead of granting the leave mentioned in § 51, *supra*, direct in the alternative the demurrer to be put in alone, and may at the same time and in the same order reserve liberty to plead (if necessary) to the same matter after the demurrer is disposed of (xxviii. 5). The like liberty to plead after the demurrer is disposed of may be granted by the court at the time the demurrer is argued and overruled, if that should be the case (xxviii. 12).

§ 52. *The Pleadings.—The Reply.*—The third pleading in order of succession is either the reply or else a demurrer to defendant's statement of defence, and in either case, it may be of the plaintiff to the defendant's statement of defence or to his defence and counter-claim, or it may be of some new party defendant to the defence and counter-claim. The plaintiff's reply to a simple statement of defence is usually a simple joinder of issue thereon; and if so, that is a close of

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(a) And see *Thomson v. S. E. Railway Co.*, 9 Q. B. D. 320.

(b) *Powell v. Jewsbury*, 9 Ch. Div. 34.

the pleadings; but occasionally his reply to a simple statement of defence introduces new matter of substance, in answer to what is alleged in the statement of defence. The plaintiff's demurrer to defence (with or without counter-claim) is governed in all respects by the rules regarding demurrer already explained (§ 46, *supra*); and the same is to be said regarding the demurrer of every third person to statement of defence and counter-claim. But where such third party puts in a reply to defendant's statement of defence and counter-claim, then such third party's reply is (in effect) his statement of defence to the defendant's counter-claim, and is to be shaped according to the rules of pleading applicable to statements of defence, as already expounded (§ 47, *supra*) (c); and apparently the plaintiff may in his reply to defendant's counter-claim himself also counter-claim in respect of a cause of action accrued after the issue of the writ but arising at the same time and out of the same transaction as defendant's counter-claim (d).

§ 53. *The Pleadings.*—*Defences arisen subsequently to Action commenced.*—As a general rule, the state of matters existing at the commencement of the action (*i.e.*, at date of writ issued) is the only state of matters that is recognised. But under the old practice pleadings *puis darrein continuance* were introduced, and under the new practice defences of the like character are permitted; that is to say,—

(a.) A defendant may plead to a statement of claim a matter of defence thereto which has arisen subsequently to writ issued, introducing such new matter into his defence (if not already delivered), or into a further defence (if the first defence has been already delivered).

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(c) *Benbow v. Low*, 13 Ch. Div. 553.

(d) *Tuke v. Andrews*, 8 Q. B. D. 428.

(b.) A plaintiff (or, *semble*, any other party defendant to a counter-claim) may plead to any counter-claim (or set-off) a matter of defence thereto which has arisen subsequently to counter-claim delivered, introducing such new matter into his reply (if not already delivered) or into a further reply (if the first reply has been already delivered).

But a further defence or a further reply (as the case may be) cannot be put in, excepting within eight days after the matter has arisen, and by leave of the court or a judge (xx. 1, 2).

And, *nota bene*, matters arisen subsequently to commencement of action may, *semble*, be included in a defendant's counter-claim (e).

§ 54. *The Pleadings.—Plaintiff's Confession of Defence arisen Subsequently to Action commenced.*—When any defence or further defence of matter arisen subsequently to action commenced is (in plaintiff's opinion) such as to defeat his claim, then plaintiff may, instead of replying, deliver a confession of such defence or further defence, and sign judgment for costs up to date of such defence or further defence delivered (xx. 3) (f).

§ 55. *The Pleadings.—Withdrawal of whole or part.*—A plaintiff may withdraw the entire cause of action, in which case he is said to discontinue same (see § 71, *The Trial.—Discontinuance of Action*). Or he may withdraw part only of the cause of action, doing so without leave before defendant has delivered his statement of defence, or at any time before reply if statement of defence has been delivered (xxiii. 1), and

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(e) *Beddall v. Maitland*, 17 Ch. Div. 174, distinguishing *Original Hartlepool Colliery Co. v. Gibb*, 5 Ch. Div. 713; *Ellis v. Munson*, 35 L. J. N.S. 585.

(f) *Champion v. Formby*, 7 Ch. Div. 373.

doing so only with leave and upon terms at any subsequent stage of the action. The plaintiff is in each case to pay to the defendant the costs occasioned by the matter withdrawn (xxiii. 1), and for such costs the defendant may sign judgment (xxiii. 2a). A defendant may, but only with leave, withdraw the whole or any part of his defence or of his counter-claim (xxiii. 1) (g).

§ 56. *The Pleadings.—Amendment of.*—There is no pleading (not even a simple joinder of issue) which may not require to be amended, and that on many accounts. Thus, in cases where formerly there would have been a new assignment, there is now to be an amendment merely of the statement of claim (xix. 14). Sometimes, however, instead of amendment of a pleading already delivered, there is to be a further pleading of the same sort, *e.g.*, either a further defence or a further reply (xx. 1, 2), as explained in § 53, *supra*. Sometimes, also, it is preferable, *semble*, instead of amending a preceding pleading, to introduce the fresh matter into the next following pleading (see § 52, *supra*). But in by far the larger number of cases, seeing that the pleadings usually close with the plaintiff's reply, it is the usual course for the plaintiff to amend his statement of claim and for the defendant to amend his statement of defence, and occasionally the one party by adverse motion may compel the other party to amend his own pleadings involuntarily (xxvii. 1); and the amendment may extend even to adding a new title to the action (h). Any such amendment may be either original on the part of the amending person, or consequential upon the amendment of a previous adverse pleading.

#### I. Original amendments :—

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(g) *Real and Personal Advance Co. v. M'Carthy*, 18 Ch. Div. 362.

(h) *Seear v. Lawson*, 16 Ch. Div. 121; *Williams v. Preston*, 20 Ch. Div. 672.

(a.) The plaintiff may without any leave amend his statement of claim once, provided he do so within the times following, that is to say,—

(1.) Where a statement of defence has been delivered within three weeks after such delivery, the plaintiff not having (meanwhile) inconsistently replied to the statement of defence (xxvii. 2);

(2.) Where no statement of defence has been delivered within four weeks of the appearance of the last appearing defendant (xxvii. 2).

(b.) The defendant may not amend his statement of defence (being a defence simply) at all without leave; but he may without any leave amend his counter-claim once, provided he do so within the times following, that is to say,—

(1.) Where a reply has been delivered within four days after such delivery,—the defendant not having (meanwhile) inconsistently pleaded to the reply (xxvii. 3).

(2.) Where no reply has been delivered within 28 (twenty-eight) days from the filing (or delivery) of his defence (xxvii. 3).

(c.) Either party may, with leave, amend at any time, not being after final judgment (†), his own pleading (being either statement of claim, statement of defence, or reply), for the purpose of defining the real question in dispute (xxvii. 1).

(d.) Either party may, upon motion or summons, obtain an adverse order against the other party to strike out or amend anything in the adverse pleading that ought to be amended or struck out, either as being scandalous, embarrassing, dilatory, or otherwise prejudicing the fair and speedy trial of the action (xxvii. 1); *e.g.*, vague allegations of title put forward by a

plaintiff, who has never been in possession of the land claimed (*j*).

## II. Consequential amendments:—

(1.) In all cases of a previous adverse pleading being amended by either party without leave or order (as above explained), if the other party desires to amend his own pleading in consequence of such amendment in the previous adverse pleading, he may do so, but only with leave (xxvii. 5) (*k*).

(2.) In all the same cases, if the other party desires the amendment of the previous adverse pleading to be disallowed, either in whole or in part, or, if allowed, then to be allowed upon terms only, he may obtain an order of the court to that effect (xxvii. 4).

Generally, all amendments may be made with leave, to be obtained either upon summons or by motion (xxvii. 6), but in cases other than those above specified upon terms only (*l*); and there is a limit to permissible amendments (*m*).

Every amended pleading is to be delivered to the other party within the time allowed for amending same (xxvii. 10); and where an order giving leave to amend has been requisite and has been made, the time allowed for amendment is fourteen (14) days from the date of the order, unless some other time is specified in the order (xxvii. 7), but the time may be extended (xxvii. 7). Every amended pleading is to be marked as such (xxvii. 9), the order (if any) giving leave being also specified on the amended pleading (xxvii. 9). Usually amendments may be interlined in writing, where they do not exceed (in any one place) 144 words, and the

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(*j*) *Phillips v. Phillips*, 4 Q. B. D. 127; and see *Millington v. Loring*, 6 Q. B. D. 190.

(*k*) *Boddy v. Wall*, 7 Ch. Div. 164; *Stokes v. Grant*, 4 C. P. Div. 45.

(*l*) *Tildeley v. Harper*, 10 Ch. Div. 393.

(*m*) *Laird v. Briggs*, 16 Ch. Div. 440, 653.

interlineation does not occasion intricacy and obscurity ; but otherwise the pleading as amended must be re-printed (xxvii. 8).

§ 57. *The Pleadings.—Close of.*—So soon as either party joins issue simply upon the last preceding pleading of another party, the pleadings as between such two parties are closed ; and so, if there are other parties to the action, when the like joinder of issue is delivered as between them (xxv.) So also, if a party bound to plead neither joins issue upon the last preceding pleading nor (with or without leave, as the case may require) pleads otherwise thereto, he is taken to have admitted the statements of fact in the pleading last preceding, and such admission (although not to be made a ground of judgment for default) operates to close the pleadings (xxix. 12). In general, the pleadings close with the reply (being the third pleading in order), as that is usually a simple joinder of issue on the defendant's statement of defence. It may, however, contain new matter ; and when a counter-claim is set up in the statement of defence, then the reply necessarily contains new matter (either with or without a joinder of issue upon the portion of statement of defence that is the defence proper) ; and whenever, in either or any of these cases, such new matter is introduced into the reply, then some pleading or pleadings must necessarily follow the reply,—either (1.) A simple joinder of issue upon the new matter, or (2.) With the leave of the court, a pleading containing still further new matter, in answer to the new matter contained in the reply (xxiv. 2). And so on, until there is a simple joinder of issue by either party upon the last preceding pleading of the other party ; and upon such ultimate joinder of issue the pleadings are said to have closed (xxv.)\*

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\* See also Tabular Statement at end of this Epitome of the Practice.



§ 58. *The Pleadings.—Preparation of Issues.*—The pleadings being (as already explained) simple statements of facts, it may occasionally (although of right it never should) happen that the real issue or issues in dispute between the parties are not sufficiently defined; and in that case it is necessary to define same with greater point and exactness before going to trial. If, upon the existing pleadings, counsel is of opinion that issues should be prepared, he should move the court for an order directing their preparation, and the court in its order will provide liberty to the parties to apply to the court itself for the final settlement of the issues or any of them, in case the parties themselves or their counsel cannot agree upon them (xxvi.) (m).

§ 59. *The Pleadings. — Special Case.* — After writ issued, the parties (if so disposed) may concur in stating any special case, raising all or any questions of law involved in the action (xxxiv. 1); and judgment may be given upon the special case, or in the terms of any written agreement of the parties (xxxiv. 6, April 1880); also, at any time before or at the trial, if it appear to the court that there is a preliminary question of law to be decided, and that the proof of facts is a matter subordinate thereto, the court may order the question of law to be decided on a special case or other form sufficiently raising it, and in the meantime the proof of facts is stayed (xxxiv. 2) (n). No special case is to be stated after 6th April 1880, under the statute 13 & 14 Vict., c. 35 (xxxiv. 7, April 1880); but special cases under other particular statutes may, *semble*, still be stated (o).

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(m) *Emma Silver Mining Co. v. Grant*, 11 Ch. Div. 918; *Piercy v. Young*, 15 Ch. Div. 475.

(n) *Tasmanian Railway Co. v. Clark*, W. N. 1879, p. 88.

(o) *Peterborough Corporation v. Thurlby Overseers*, 8 Q. B. D. 586; and see *Bezley Local Board v. West Ham Sewerage Board*, 9 Q. B. D. 518.

Every special case is to be printed by the plaintiff, signed by all the parties (or their solicitors), and filed by the plaintiff (xxxiv. 3). Either party may enter it (*i.e.*, set it down) for argument, first obtaining, where married women, infants, or lunatics are concerned, an order giving leave to set it down. The order is obtained upon an affidavit or affidavits of the truth of the statements contained in the special case (xxxiv. 4, 5).

### SECTIONS 60–66.

#### THE EVIDENCE—THE FORMAL PROCEDURE WITH THE SUMMARY PROCEDURE INCIDENTAL THERETO.

§ 60. *The Evidence.—How far obtained by Discovery.* (I.) Interrogatories.  
 —At the time of delivering his statement of claim (but only in suitable cases) (*p*), and more properly after he has seen the defendant's statement of defence (*q*), and at any subsequent time not later than the close of the pleadings, the plaintiff may without leave, and subsequently to the close of the pleadings the plaintiff may with leave, deliver *Interrogatories* in writing for the examination of the defendant (xxxi. 1); in like manner, at the time of delivering his statement of defence, but not before delivering same, and at any subsequent time not later than the close of the pleadings, the defendant may without leave, and subsequently to the close of the pleadings the defendant may with leave, deliver *Interrogatories* in writing for the examination of the plaintiff (xxxi. 1), and either party may deliver interrogatories as aforesaid, although the information sought may be obtained otherwise in the action (*r*). These interrogatories should be reasonable, and not vexatious or improper (xxxi. 2), unless where they are

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(*p*) *Harbord v. Monk*, 9 Ch. Div. 616; *Union Bank of London v. Manby*, 13 Ch. Div. 239; *Davies v. Williams*, 13 Ch. Div. 550.

(*q*) *Mercer v. Cotton*, 1 Q. B. D. 442; *Hancock v. Guerin*, 4 Exch. Div. 3.

(*r*) *The Radnorshire*, 5 P. D. 172; *Att.-Gen. v. Gaskill*, 20 Ch. Div. 519.

relevant, however vexatious, scandalous, or criminal-exposing (*s*). Interrogatories going to credit only are irrelevant, and should not be put (*t*); but interrogatories as to conversations may be put, subject to certain restrictions (*u*). Interrogatories as to the brief of the other side are of course not allowed (*v*). Where either party is a corporate or other public body, the other party, if desirous of interrogating it, is to obtain at chambers an order giving him leave to administer the interrogatories to any specified member or officer of the body (xxx. 4) (*w*). Interrogatories may also be administered in matters other than actions, *e.g.*, in a winding-up (*x*), and upon an election petition (*y*). But apparently one defendant to a counter-claim may not interrogate another such defendant (*z*).

**Answer to Interrogatories.**

The party interrogated is to answer by affidavit, to be filed within ten days (extendible) after service of the interrogatories upon him (xxx. 6), and the costs of same need not be tendered (*a*); and the plaintiff, although nominal, must answer (*b*), and the affidavit must answer sufficiently (xxx. 9), or else refuse to answer one or more of the interrogatories, stating in the affidavit the objection to answering same and the grounds of such objection (xxx. 5, Nov. 1878). The sufficiency of the answer, if the interrogating party disputes same, may be decided on summons or motion specifying the particular interro-

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(*a*) *Fisher v. Owen*, 8 Ch. Div. 654.

(*t*) *Allhusen v. Labouchere*, 3 Q. B. D. 645; *Gay v. Labouchere*, 4 Q. B. D. 206.

(*u*) *Eade v. Jacobs*, 3 Exch. Div. 335; *Johns v. James*, 13 Ch. Div. 370.

(*v*) *Benbow v. Low*, 16 Ch. Div. 93.

(*w*) *Higginson v. Hall*, 10 Ch. Div. 235; *Berkeley v. Standard Discount Co.*, 13 Ch. Div. 97; *Swansea (Mayor) v. Quirk*, 5 C. P. Div. 106.

(*x*) *In re Alexandra Palace Co.*, 16 Ch. Div. 58; *In re Metropolitan Bank, Heiron's Case*, 15 Ch. Div. 139.

(*y*) *Wells v. Wren*, 5 C. P. Div. 546.

(*z*) *Molloy v. Kilby*, 15 Ch. Div. 162.

(*a*) *Berkeley v. Standard Discount Co.*, *supra*.

(*b*) *Wilson v. Raffalovich*, 7 Q. B. D. 553.

gatories or part of interrogatories objected to (c), and on this application the validity of the objection to answering and of the grounds of such objection can be gone into also (xxxi. 9, 10). The grounds of objection open to be taken in the affidavit in answer are,—That the interrogatory is scandalous,—is irrelevant (d),—is not *bond fide* for the purpose of the action,—is not sufficiently material at the *then* stage of the action (e), and such like (xxxi. 5, Nov. 1878). And the party required to answer objectionable interrogatories may also (within four days after being served with them) apply at chambers to set them aside on the ground,—That they are unreasonable,—or vexatious,—or scandalous (xxxi. 5, Nov. 1878) (f). Other usual grounds of objection to answering interrogatories are those of privilege, or exposure to criminal prosecution, &c., that are open to witnesses under cross-examination. If the court decides the affidavit to be insufficient as an answer to the interrogatories or to any of them, or if no answer at all is put in, the interrogating party may obtain an order requiring the other party to put in a further answer or an answer (as the case may be), and that either by a further affidavit or an affidavit (as the case may be), or by *viva voce* examination (xxxi. 10). At the trial of an action or of an issue, any party may use in evidence any one or more of the answers of the other side without putting in the others (xxxi. 23); but the judge may (and, of course, upon the slightest suggestion, will) look at the whole of the answers (xxxi. 13).

The affidavit if not exceeding ten folios (xxx. 7a) may be written; but otherwise it must be printed.

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(c) *Austen v. N. & S. Woolwich Subway Co.*, 11 Ch. Div. 439.

(d) *Sheppard v. Lord Lonsdale*, 5 C. P. Div. 47.

(e) *Lyon v. Tweddell*, 13 Ch. Div. 375; *Parker v. Wells*, 18 Ch. Div.

477.

(f) *Gay v. Labouchere*, 4 Q. B. D. 206; *Dalrymple v. Leslie*, 8 Q. B. D. 5.

Non-compliance with any order to answer interrogatories subjects the defaulting party to the possibility of an order for his attachment, and also to the possibility of an order dismissing his action (if a plaintiff) (*g*), or striking out his defence (if a defendant), with all incidental consequences (xxxi. 20).

(II.) Order to make affidavit of documents.

The affidavit of documents.

On summons at chambers, unsupported (unless in exceptional cases) by any affidavit, on the application of either party an order will be made directing the other party, or even a third party noticed and appearing (*h*), to make discovery on oath of the documents relating to the action which are or which have been in his possession or power (xxxi. 12). The plaintiff should not apply for this order, in general, until he has seen the defendant's defence (*i*). An official or other referee cannot make an order for production (*j*). The party so ordered to make discovery complies with the order by swearing and filing an affidavit of the documents in question, in the form No. 9 in Appendix B. to the Acts (xxxi. 13); and in such affidavit he is to specify such of the documents as he objects to produce (xxxi. 13). His grounds of objection are usually,—That the documents are privileged (*k*)—or that they relate to the deponent's own title (*l*); and occasionally, that the applicant's claim to see them is inconsistent with the position he takes up as plaintiff in his action (*m*).

In case the affidavit of documents is insufficient,

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- (*g*) *Carter v. Stubbs*, 6 Q. B. D. 116.  
 (*h*) *M'Allister v. Bishop of Rochester*, 5 C. P. Div. 194.  
 (*i*) *Hancock v. Guerin*, 4 Exch. Div. 3.  
 (*j*) *Danvillier v. Myers*, 17 Ch. Div. 346.  
 (*k*) *Nordon v. Defries*, 8 Q. B. D. 58.  
 (*l*) *Taylor v. Batten*, 4 Q. B. D. 85; *New B. M. I. Co. v. Peed*, 3 C. P. Div. 196; *S. & V. W. Co. v. Quick*, 3 Q. B. D. 315; *Gardner v. Irvin*, 4 Exch. Div. 49; *Lyell v. Kennedy*, 20 Ch. Div. 484.  
 (*m*) *Owen v. Wynn*, 9 Ch. Div. 29; and see *Tomline v. The Queen*, 4 Exch. Div. 252.

application may be made for a further full and sufficient affidavit (*n*), but only if from the first affidavit itself, or from the documents therein referred to, or from an admission in the pleadings, the insufficiency of the first affidavit appears (*o*); and otherwise the first affidavit is conclusive of its own sufficiency (*p*).

So soon as the affidavit of documents has been made, or occasionally before it is made, *e.g.*, when it can be dispensed with, either party to the action may at any time before or at the trial give to the other party notice in writing to produce any documents referred to in his affidavits or pleadings for the inspection of the party giving the notice, and so as that such party may take copies thereof (xxx. 14) (*q*).

(III.) Notice to produce for inspection, &c., documents referred to in affidavit or pleading.

The party who receives the notice to produce is within two days (if the affidavit of documents has specified them all), or within four days (if otherwise) after receiving the notice, to notify to the other (*i.e.*, noticing) party a time within three (3) days from the delivery of his notification, and also a place for the inspection of such of the documents as the notifying party does not (in his notification) specify that he objects to produce: the grounds of objection must also be specified in the notification (xxx. 16), and the party refusing to produce may possibly not be allowed to give the document in evidence (xxx. 14) (*r*).

The offer of inspection, &c.

The court may at any time in a pending proceeding order, upon the application of either party, the production upon oath by the other party of such of the documents in his possession or power as the court thinks

(IIIa.) Order to produce for inspection.

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(*n*) *Vicary v. G. N. R. Co.*, 9 Q. B. D. 168.  
 (*o*) *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556.  
 (*p*) *Bewick v. Graham*, 7 Q. B. D. 400.  
 (*q*) *Webb v. East*, 5 Exch. Div. 23, 108.  
 (*r*) *Webster v. Whewell*, 15 Ch. Div. 120; and see *Brown v. Sewell*, 16 Ch. Div. 517.

fit (xxxi. 11); and if, therefore, the party served with notice to produce omits to notify a time and place for inspection, or objects to grant inspection (s), the party desiring inspection may apply for an adverse order for inspection (xxxi. 17), upon summons or by motion supported by an affidavit showing (as regards all documents other than those referred to in the pleadings or affidavits) what the documents are, and that the applicant has a right to see them, and that they are in the possession or power of the other party (xxxi. 18) (t). But if the court finds an objection to production stated either in the affidavit of documents or in the notification of time and place for inspection, and if the court is satisfied that the applicant's right to the inspection he asks depends on the determination of some issue or question in dispute in the action, or that it is otherwise desirable to postpone the inspection, then the court may order such issue or question to be first determined, and reserve meanwhile the right to inspection (xxxi. 19) (u).

Enforcement  
of the order to  
produce.

Non-compliance with any order to make an affidavit of documents, or to produce documents for inspection, subjects the defaulting party to the possibility of an order for his attachment (xxxi. 20), and also to the possibility of an order dismissing his action if a plaintiff, or striking out his defence (if a defendant), with all incidental consequences (xxxi. 20) (v).

§ 61. *The Evidence.—How far Superseded by Admissions.*—There are two varieties of admissions, viz., (1.) The admission of documents, and (2.) The admission of allegations contained in the pleadings.

(s) *In re Credit Co.*, 11 Ch. Div. 256.

(t) *Egremont Burial Board v. Egremont Iron Ore Co.*, 14 Ch. Div. 158; *In re Smyth*, 15 Ch. Div. 296.

(u) *Phillips v. Phillips*, W. N. 1879, p. 96; *Wheeler v. Marchant*, 17 Ch. Div. 675.

(v) *Republic of Liberia v. Roye*, L. R. 9 Ch. App. 569; 1 App. Ca. 139.

(1.) Regarding documents, either party may give to the other a notice to admit documents, saving all just exceptions. The other party admits the documents specified in the notice by writing at the foot thereof the words "we admit," &c., saving all just exceptions.

*Nota Bene.*—Documents admitted in this manner should still be put in at the trial, if they are to be used on an appeal (*w*).

(2.) Regarding allegations in pleadings:—

(a.) Every allegation in a pleading which is not denied or expressed to be not admitted in the next subsequent pleading (not being a simple joinder of issue) is deemed to be admitted (xix. 17), unless the alleged admission is something non-existing in law (*x*), and excepting as against a married woman, infant, or lunatic. Also,

(b.) Where a person, being bound to plead in some shape or other, does not plead either by way of joinder of issue or (with or without leave, as the case may be) by some other substantive pleading to the last preceding pleading, then he is taken to have admitted the statements of fact contained in such last preceding pleading (xxix. 12). And where issues arise between a third party and plaintiff or defendant, if any of them make default in pleading to the pleading of the other or others, then judgment may be given on the pleadings without any evidence (xxix. 13). And where a defendant has refused compliance with an order to answer interrogatories, or for discovery or inspection of documents, an order may be made striking out his defence, the effect of which would, *semble*, be that all the statements of fact in statement of claim would stand admitted, and judgment might be obtained, if not for default, at least on admissions (xxxi. 20).

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(*w*) *Watson v. Rodwell*, 11 Ch. Div. 150.

(*x*) *Chilton v. Corporation of London*, 7 Ch. Div. 735.



§ 62. *The Evidence.—How far obtained by Inspection of Property.*—For the purpose of obtaining full information or evidence, the court or a judge may, upon the application of any party to the action, make any order for the inspection of any property, being the subject of such action, and for that purpose may, upon the same or any further application, authorise any person or persons to enter upon or into any land or building in the possession of any party to the action, and to take samples, and to make observations, and to try experiments (lii. 3).

§ 63. *The Evidence.—When vivâ voce.*—The general rule is, that at the trial of the action, or upon any assessment of damages (y), the evidence shall be taken *vivâ voce*,—each party examining in chief his own witness, who is then subjected to cross-examination by the other side (if they should so desire), and, lastly, is re-examined (if necessary) by the party calling him (xxxvii. 1); and the Judicature Acts, or the orders or rules thereunder, have made no alterations in these respects (Act 1875, § 20), excepting that and so far as the court is thereby enabled to permit (for special reasons) depositions or affidavits to be read at the trial.

§ 64. *The Evidence.—When by Affidavit.*—Upon all interlocutory applications (i.e., upon any motion, petition, or summons) in the action, the evidence may be given by affidavit (xxxvii. 2); and the evidence of any particular witness may for sufficient reasons be taken (by order) before an officer of the court (either official referee or examiner), or before a special examiner, the evidence so taken being a deposition, and the deposition being (by order) filed, and the deposition so filed being (by order) made available in evidence upon terms (xxxvii. 4) (z); and at the trial of the action, or

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(y) *Att.-Gen. v. Metropolitan Railway Co.*, 5 Exch. Div. 218.

(z) *Llanover v. Homfray*, 13 Ch. Div. 380; 19 Ch. Div. 224; *Warner v. Mosses*, 16 Ch. Div. 100.

upon any assessment of damages, any particular fact or facts may (by order) be proved by affidavit, but not if the witness can be produced, and the other side wishes to cross-examine him (xxxvii. 1); and at the trial, or upon any assessment of damages, the entire evidence may (by agreement of all parties) be taken by affidavit (xxxvii. 1). All affidavits at the hearing must be regarding matters of the deponent's own positive knowledge; but upon interlocutory applications, may be regarding matters of information or belief only, provided that the sources or grounds of the information or belief respectively are shown (xxxvii. 3), but not when an application, although interlocutory in form, is final in effect (*a*).

The agreement to take the entire evidence by affidavit must be in writing (*b*); but when the agreement does not exclude oral evidence, the affidavits may be supplemented, *semble*, at the trial by *viva voce* evidence (*c*). Where there is such an agreement, the plaintiff files his affidavits within fourteen days (extendible) after the agreement, and gives the defendant a list thereof (xviii. 1); and the defendant files his affidavits within fourteen days (extendible) after receiving plaintiff's list, and gives the plaintiff a list thereof (xxxviii. 2); and the plaintiff files his affidavits in reply, being STRICTLY IN REPLY to the defendant's affidavits, or else merely CONFIRMATORY of previous affidavits (*d*), within seven days (extendible) after receiving defendant's list, and gives the defendant a list thereof (xxxviii. 3).

All affidavit evidence (including depositions) that is used for the first time at the trial is to be printed

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(a) *Gilbert v. Endean*, 9 Ch. Div. 259.

(b) *New Westminster Brewery Co. v. Hannah*, L. R. 2 Ch. Div. 217.

(c) *Glossop v. Heston and Isleworth Local Board*, 26 W. R. 433.

(d) *Peacock v. Harper*, 7 Ch. Div. 648.

(xxxviii. 6); but affidavit evidence (including depositions) previously used in the action need not in general be printed (Aug. 1875, ii.), unless the court so orders, but may be printed if the parties like (Aug. 1875, iii.) No order of the court, but only the consent of the parties, is required in order to use at the trial affidavits used previously on interlocutory applications (e).

§ 65. *The Evidence.—Cross-Examination on Affidavits.*—Upon interlocutory applications (i.e., on a motion, summons, or petition), the court *may* (but without very sufficient reasons will not) order the attendance for cross-examination of the person or persons making the affidavit (xxxvii. 2); and even where the court orders the attendance for cross-examination, it does not follow that such attendance is to be in court; it may be, on the contrary (and usually is and ought to be), directed to be had before an examiner of the court (f). Where the evidence in chief is directed to be taken by deposition, it is convenient to make the cross-examination follow, so as to become part of the deposition (xxxvii. 4). At the trial of the action, or upon any assessment of damages, when (by agreement) the entire evidence is taken by affidavit, any party desiring to cross-examine the people (or any of them) who have made affidavits may, within fourteen days (extendible) after the plaintiff's affidavits in reply have been filed, serve upon the other party a notice in writing requiring the production of the people (or any of them) who have made affidavits for cross-examination on their affidavits at the trial or assessment of damages (xxxviii. 4), and the other party upon being served with such notice to produce may, by subpoena *ad testificandum*, compel the attendance of such witnesses accordingly (xxxviii. 5), seeing that without their attendance their affidavits cannot in

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(e) *Blackburn Union v. Brooks*, 7 Ch. Div. 68.

(f) *South Wales, &c., Steamship Co., In re*, 20 Sol. Journ. 232.

general be used at all (xxxviii. 4); but apparently cross-examination may be avoided if the affidavit is withdrawn (*g*). The costs of producing a witness for cross-examination are to be borne, at least in the first instance, by the party producing him (xxxviii. 4).

§ 66. *The Evidence.—Miscellaneous Points.—*

(*a*.) All writs and other documents issued out of or filed in the District Registry, and all exemplifications and copies thereof, purporting to be sealed with the seal of the District Registry, are receivable in evidence in all parts of the United Kingdom without further proof thereof (Act 1873, § 61) (*h*).

(*b*.) As regards admissions of documents made in pursuance of any notice to admit same, the affidavit of the solicitor (or clerk) of the due signature of the admissions shall, where such admissions are annexed to the affidavit, be sufficient evidence of such admissions (xxxii. 4).

(*c*.) As regards renewal of writs of execution, the production of the writ or of the notice renewing same is sufficient evidence of the renewal, provided the writ or notice purport to be sealed with the renewal seal of the court (xlii. 17).

(*d*.) Evidence may, by leave only, be taken by commission in a proper case (*i*), and that either within or without the jurisdiction.

*N.B.*—Regarding evidence on *Appeals*, see §§ 130–135, *Appeals*.

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(*g*) *Ex parte Child, In re Ommaney*, 20 Ch. Div. 126.

(*h*) See *Brooke v. Brooke*, 17 Ch. Div. 833.

(*i*) *Stewart v. Gladstone*, 7 Ch. Div. 394; *Crofton v. Crofton*, 20 Ch. Div. 760.

## SECTIONS 67-74.

THE TRIAL.—THE *FORMAL* PROCEDURE WITH THE  
*SUMMARY* PROCEDURE INCIDENTAL THERETO.

§ 67. *The Trial.—Venue for.*—If no venue is stated in the plaintiff's statement of claim, then the venue for trial is Middlesex, subject to the judge ordering a different venue on motion of either party, the judge's order being appealable to a Divisional Court (xxxvi. 1). If a venue other than Middlesex is stated in the plaintiff's statement of claim, then the venue for trial is that so stated, subject to the judge ordering a different venue on motion of the defendant (and, *quære*, of the plaintiff even), the judge's order being appealable to a Divisional Court (xxxvi. 1).

§ 68. *The Trial.—Notice of.*—The plaintiff gives notice of trial, and may do so either along with his reply (when that is the close of the pleadings), or at any time afterwards (xxxvi. 3); and if the plaintiff fail for six weeks (extendible) after the close of the pleadings to give the notice, the defendant may give plaintiff the notice, provided he anticipate the plaintiff in so doing (xxxvi. 4). The notice of trial is to state whether the trial is of the action or of issues therein (xxxvi. 8). The notice is usually a ten days' notice (xxxvi. 9); short notice is four days (xxxvi. 9). The notice of trial, whether the same be given by the plaintiff or by the defendant, is to specify the mode of trial intended (xxxvi. 3, 4), being one or other of the five modes of trial hereinafter specified. The notice of trial ceases to be in force, unless the action is entered for trial by one party or another within six days after the notice (xxxvi. 10a); and excepting by consent or by leave, no notice of trial can be countermanded (xxxvi. 13). And, of course, the notice of

trial must be given before entering the action for trial (xxxvi. 10).

§ 69. *The Trial.—Modes of.*—There are the following modes of trial for either party to select from, viz. :—

- (1.) Before a judge (or judges) sitting alone.
- (2.) Before a judge sitting with assessors.
- (3.) Before a referee (official or special) sitting alone.
- (4.) Before a referee (official or special) sitting with assessors. And,
- (5.) Before a judge and jury (xxxvi. 2).

The party giving the notice of trial has the first right of selection; if he specify trial before a judge and jury, and the question is one which (prior to the Judicature Acts) might have been tried before a judge sitting alone, then the judge may in his discretion, upon the application of the other party (by summons or on motion), direct a trial without a jury (xxxvi. 26) (*j*); and the court will always do so, if there has been a consent to take the entire evidence at the trial by affidavit (*k*), or if the evidence is documentary (*l*). But otherwise trial by a jury is in the option of either party to demand as a right (Act 1875, § 22) (*m*), even in county courts (*n*). And subject to such right of the party, the judge may order different questions of fact to be tried in different modes of trial, with all incidental directions (xxxvi. 6). And

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(*j*) *Rushton v. Tobin*, 10 Ch. Div. 558; *Spratt's Patent v. Ward & Co.*, 11 Ch. Div. 240; *Singer Manuf. Co. v. Loog*, 11 Ch. Div. 656; but see *In re Martin*, *Hunt v. Chambers*, 20 Ch. Div. 365.

(*k*) *Brooke v. Wigg*, 8 Ch. Div. 510.

(*l*) *Wedderburn v. Pickering*, 13 Ch. Div. 679.

(*m*) *Sugg v. Silber*, L. R. 1 Q. B. D. 362; *Powell v. Williams*, 12 Ch. Div. 234; and especially *In re Martin*, *Hunt v. Chambers*, 20 Ch. Div. 365. And see *Clarke v. Skipper*, 21 Ch. Div. 134.

(*n*) *Ford v. Taylor*, 3 C. P. Div. 21.

in matters of intricate and scientific or local examination or investigation,—of documents, accounts, and such like,—the court may peremptorily, without the consent of the parties, send same to an official or special referee (Act 1873, § 57) (*o*), such referee being for this purpose a supernumerary officer of the court (Act 1873, § 58). If neither party has selected trial by jury, and of either party desires a mode of trial different to that specified in the notice of trial, then such party, within four days from service of notice of trial, may obtain (on motion or summons) an order directing such mode of trial as the applicant desires (xxxvi. 5). And either before or at the trial (when without a jury), the judge may direct any issue of fact to be tried by a judge and jury (xxxvi. 27); and in a trial without a jury the judge may also from time to time direct any question or issue of fact, or partly of fact and partly of law, to be tried at *nisi prius* (xxxvi. 29),—the order directing such trial at *nisi prius* to state on its face the reason for the direction (xxxvi. 29*a*, Dec. 1876); but no such reason need be given in the case of a Chancery action stating no venue, and set down to be tried in Middlesex (*p*).

§ 70. *The Trial.—Entry of Action for.*—The party who gives the notice of trial is to enter the action for trial on the day of or day after the notice (*q*); and if he fail to do so, the other party may within the next four days enter the action for trial (xxxvi. 14); if neither party enter the action for trial within six days after the notice of trial, then, as regards trials in London and Middlesex only, the notice ceases to be of force (xxxvi. 10*a*). The party entering the action for trial is to leave two copies of the pleadings (xxxvi. 17).

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(*o*) *Clow v. Harper*, 3 Exch. Div. 198.

(*p*) *Hunt v. City of London Real Property Co.*, 3 Q. B. D. 19.

(*q*) *Metropolitan I. C. Railway Co. v. Metropolitan Railway Co.*, 5 Exch. Div. 196.

If the plaintiff specifies trial by jury as his selected mode of trial, the action is to be entered for trial in the Associates' office and not in the Chancery office; and if plaintiff should not have specified, but defendant should afterwards determine upon, trial by jury, the action having meanwhile been entered in the Chancery Office, will be afterwards entered in the Associates' Office (Chancery Notice, Feb. 1877).\*

§ 71. *The Trial.—Discontinuance of Action.*—When a plaintiff has become aware of any defendant's defence, whether before delivery of same or at any time before replying thereto, he may wholly discontinue his action by delivering a notice in writing to that effect. And he may, with the leave of the court, or of a judge, and upon terms, do the like at any subsequent stage of the action; such leave will not be granted as a matter of course (r). The discontinuance does not prejudice any subsequent action, unless in the case of leave to discontinue being required and given, one of the terms is to that effect (xxiii. 1); the discontinuance of the action puts an end to the counter-claim if any (s), and also to any pending interlocutory appeal (t). The plaintiff is, in each case, to pay to the defendant the costs of the action (xxiii. 1), and for such costs the defendant may sign judgment (xxiii. 2) (u). Upon any discontinuance of action, if an injunction has already been granted therein subject to the usual undertaking as to damages, the defendant may also have a reference in the action to chambers to ascertain the damages (v). A cause, when entered for trial, may be withdrawn by consent of all parties, either the

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\* Actions proceeding in any District Registry may be entered for trial in the District Registry (Act 1873, § 64; xxxv. 1a, 1b, Dec. 1879.

(r) *Stahlschmidt v. Walford*, 4 Q. B. D. 217.

(s) *Vavasseur v. Krupp*, 15 Ch. Div. 474.

(t) *Conybeare v. Lewis*, 13 Ch. Div. 469.

(u) *Real and Personal Advance Co. v. M'Carthy*, 14 Ch. Div. 188; *Harrison v. Leutner*, 16 Ch. Div. 559.

(v) *Newcomen v. Coulson*, 7 Ch. Div. 764.



plaintiff or the defendant producing the requisite consent in writing (xxiii. 2a).

§ 71a. *The Trial.*—*Countermand of Notice for.*—Excepting by consent of the parties, or by leave of the court or a judge, notice of trial cannot be countermanded (xxxvi. 13).

§ 72. *The Trial.*—*Non-Appearence of one or other Party at.*—If the plaintiff appears and the defendant does not appear at the trial when the action is called on, the plaintiff proves his claim so far as the burden of proof rests with him (xxxvi. 18), but the judge may postpone or adjourn the trial upon terms (xxxvi. 21) (w).

If the defendant appears and the plaintiff does not appear at the trial, when the action is called on, the defendant (not having raised any counter-claim) may have an immediate judgment dismissing the action (xxxvi. 19), and a defendant who has raised a counter-claim proves such counter-claim so far as the burden of proof rests with him (xxxvi. 19), but the judge may postpone or adjourn the trial upon terms (xxxvi. 21).

In either of these cases, judgment is obtained for the party appearing; but the non-appearing party may apply within six days after trial to set aside the judgment upon terms (xxxvi. 20).

§ 73. *The Trial.*—*Appearance of all Parties at.*—Firstly, When before a judge (or judges) without a jury, and whether sitting alone or with assessors,—being the mode of trial most usual in the Chancery Division—the course of the trial is as follows:—The plaintiff's counsel (or leading counsel) opens the pleadings by shortly stating the nature and circumstances of

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(w) *Walker v. Budden*, 5 Q. B. D. 267.

the claim, and reading such parts of the pleadings as are calculated to bring out same more distinctly ; and at this stage the judge may interrupt him by pointing out that, even if he proved all the facts of his case, the law would not give him the right he asks, or any other right : in fact, that his statement of claim might have been demurred to. Or, if the statement of claim does not clearly appear to be demurrable, then the plaintiff's counsel (or leading counsel) mentions generally what are the defences (if any) set up by the defendant,—indicating whether or not these defences would, if proved, be sufficient or not at law ; and at this stage, therefore, a further discussion of the law of the case may arise,—just as if the plaintiff, instead of replying to the defendant's statement of defence, had demurred thereto.

Assuming, however, that the action is one in which the question is one of fact and of evidence principally or exclusively, then the plaintiff puts in his evidence, that is to say :—

(a.) Where the evidence is taken by affidavit, the plaintiff's counsel reads all the affidavits of any one deponent, after which the defendant's counsel cross-examines the plaintiff's witness on his affidavits, and the plaintiff's counsel then re-examines the witness ; and so on through all the witnesses for plaintiff who have made affidavits or an affidavit.

(b.) When the evidence is taken *vivâ voce*, the plaintiff's counsel examines in chief each of the plaintiff's witnesses, and the defendant's counsel cross-examines the same witness, and the plaintiff's counsel re-examines him.

When in either of these two ways all the plaintiff's evidence has been put in, then,—

(1.) If the defendant mentions that he is not

going to call any witnesses, the plaintiff's counsel sums up the evidence and also points the law as applicable to the facts proved, after which (unless the court should relieve the defendant of the necessity) the defendant's counsel follows, arguing that the facts are not proved, or that the law upon the facts proved is against the plaintiff,—and in such a case, the plaintiff's counsel has no reply, beyond remarking upon the new cases (if any) which the defendant's counsel may have cited and commented upon.

But (2.) If the defendant (as usually happens) mentions that he is going to call witnesses, or he has already filed affidavits, then he puts in his evidence in like manner as the plaintiff, that is to say:—

(a.) Where the evidence is taken by affidavit, the defendant's counsel reads all the affidavits of any one deponent, after which the plaintiff's counsel cross-examines the defendant's witness on his affidavits, and the defendant's counsel then re-examines the witness; and so on through all the witnesses for the defendant who have made affidavits or affidavit.

(b.) Where the evidence is taken *viva voce*, the defendant's counsel examines in chief each of the defendant's witnesses, and the plaintiff's counsel cross-examines the same witness, and the defendant's counsel re-examines him.

When in either of these two ways all the defendant's evidence has been put in,—

Then, (1.) Unless the plaintiff asks and is allowed to put in rebutting evidence as regards any part of defendant's case, the defendant sums up his evidence, and also comments upon the evidence generally of both plaintiff and defendant, and the general character of

the case and the law as applicable thereto, after which the plaintiff's counsel replies upon the whole case, as well the evidence as the law (not forgetting the points which the defendant's counsel has endeavoured to make, or has succeeded in making).

But if, (2.) The plaintiff asks and is allowed to put in rebutting evidence as regards any part of defendant's case, then with or without an adjournment of the trial (according as the exigencies of the case require) such evidence is put in, the manner of putting it in being the same as that above described for putting in evidence generally; and thereafter the plaintiff's counsel sums up his fresh evidence, and also comments upon the evidence generally of both plaintiff and defendant, and the general character of the case, and the law as applicable thereto, replying, in fact, upon the whole case, as well the evidence as the law (not forgetting the points which the defendant's counsel has endeavoured to make or has succeeded in making, and not forgetting to remark upon, and, if possible, distinguish and explain away, any decisions which the defendant's counsel has cited and turned to some apparent advantage).

Secondly, Where before a judge (or judges) with a jury,—being the mode of trial least usual in the Chancery Division,—the course of the trial is as follows:—

The plaintiff's counsel addresses the jury rather than the judge; and, as a general rule, instead of arguing the law of the case, he merely addresses himself to the facts, all objections of law that may be put forward by the judge being merely reserved (to be argued on some future occasion),—unless the judge, under exceptional circumstances, should consent to or require, as he may do (Act 1873, §§ 29, 30), the

points of law to be argued before the evidence is gone into. In putting in the evidence, and in summing up same, and in generally commenting upon the case, the plaintiff's counsel and the defendant's counsel respectively proceed in a nearly similar manner to that adopted by them respectively at a trial before a judge without a jury (as above described), the jury being, however, the persons (judices) primarily addressed; and at the end the judge sums up the case to the jury, unless he should (as he may) direct a nonsuit or a verdict for the defendant for want of evidence in support of the plaintiff's case (x); and the jury give their verdict, which verdict, together with the judgment (if any) then delivered, or any direction regarding judgment, are to be entered by the officer present at the trial, and whose duty it is to enter verdicts, or, in his absence, by the associate (xxxvi. 22a, 23).

And at the trial by jury, the judge (it is true) may reserve any case or point in a case for the consideration of a divisional court, or may direct same to be argued before such court (Act 1873, § 46); still it is the duty of the judge,—a duty upon which any party may insist,—at every such trial to submit and leave the issues involved in the action to the jury, and to properly and fully direct the jury upon the law and the evidence bearing upon the case (Act 1875, § 22); and so far as the reservation of any case or point in a case for the consideration of a divisional court, or the direction to argue same before such court, would be inconsistent with the duty aforesaid of the judge (or the right aforesaid of the party), no such reservation or direction is to be made or given (Act 1876, § 17); but otherwise such reservation or direction may be made or given (Act 1873, § 46, and Act 1876, § 17). In case the

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(x) *Dublin, &c., Railway Co. v. Slattery*, 3 App. Ca. 1155.

party should think the judge to have deprived him of this right, then he is to except, *i.e.*, object, at the trial, and the exception is to be entered upon and annexed to the record (if any), as a foundation for some further application, *viz.*, motion for new trial (Act 1875, § 22). See § 83, *infra*.

Thirdly, When before an official or special referee, whether sitting alone or with assessors,—being a mode of trial which appears to be equally little used in all the divisions,—the course of the trial is as follows:—

The trial before a referee is to be conducted in all respects (including the taking of evidence) in the same manner, as nearly as circumstances will admit, as a trial before a judge of the High Court,—it being, however, always borne in mind that the court, or a judge, before whom or in which the action (in respect of which the reference arises) is pending, may in any particular respect give special directions to the referee as to the mode of trial (Act 1873, §§ 57, 58; xxxvi. 30–32); but, subject to such controlling authority of the court, the referee has all the powers of the court or a judge (Act 1873, § 58; xxxvi. 31, 33), excepting the power to commit or to enforce his own orders by attachment or otherwise (xxxvi. 33). Likewise, the referee may, before the conclusion of any trial before him, or in his report, submit any question for the decision of the court, or may state facts specially, with power to the court to draw inferences therefrom; also, the court has power either (1) to require any explanation or reasons from the referee, and to remit the question or any part thereof for re-trial or further consideration either to the same or to any other referee, or (2) to decide the question itself on the evidence taken before the referee with or without additional evidence (xxxvi. 34, March 1879).

§ 74. *The Trial. — Complementary Proceedings Subsequent to.*—All proceedings in an action subsequent to the [hearing or] trial, and down to and including the final judgment or order (not being proceedings that require a divisional court, and of course, not being applications to the Court of Appeal), are to be had and taken, so far as is practicable and convenient, before the judge before whom the trial [or hearing] of the cause took place (Act 1876, § 17; v. 4a, March 1879) (y); and for the easier working of the practice in this respect (as well as for other more general reasons), every action (or other proceedings) in the High Court, and all business arising out of the same (not being proceedings that require a divisional court, and of course not being applications to the Court of Appeal) are to be heard, determined, and disposed of before a single judge (Act 1876, s. 17).

#### SECTIONS 75–88.

##### THE JUDGMENT.—THE FORMAL PROCEDURE WITH THE SUMMARY PROCEDURE INCIDENTAL THERETO.

§ 75. *The Judgment.—Various Modes and Grounds of obtaining, and Varieties of.*—Judgment may be obtained in various manners and upon various grounds, that is to say,—

- (1.) Judgment for Default of Appearance (xiii. 5–8).
- (2.) Judgment for Default of Pleading (xxix. 1–13).
- (3.) Judgment for Default of Appearance at Trial (xxxvi. 18, 19).
- (4.) Judgment on Admissions in the Pleadings (xl. 11).

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(y) *Jones v. Baxter*, 5 Exch. Div. 275.

- (5.) Judgment at Trial of Action (xxxvi. 22, Dec. 1876).
- (6.) Judgment on Motion for Judgment subsequent to Trial (xl. 2, 3; 7, 8).
- (7.) Judgment on Motion for Judgment without Trial (xl. 10).
- (8.) Judgment on Motion for New Trial (xl. 10).
- (9.) Judgment on Trial before Referee (xxxvi. 30-34).

Also, judgments may be either final or interlocutory according as no writ or some writ (or other proceeding) for the assessment of damages is necessary before such a judgment can be signed, so as that execution may issue upon it; and in either case (*i.e.*, whether the judgment is final or interlocutory), the court may reserve, in a proper case, the further consideration of the action (xl. 10, 11). And interlocutory judgment directing any necessary inquiries or accounts may be made at any stage of the action (xxxiii.), and, *semble*, either upon summons or motion (the most usual course) or upon motion for judgment, notwithstanding that as regards the relief or other relief sought in the action, or the questions or other questions involved therein, it may be necessary for the action to proceed in the ordinary way (xxxiii.) And where the writ is indorsed with a claim for an ordinary account (partnership, or trust, or such like), then immediately after the time limited for appearance to the writ, whether such appearance has been entered or not, an immediate judgment for such account may be obtained (xv. 1), and upon a simple summons at chambers (xv. 2); or even in the District Registry when the action is proceeding there (2). In these cases, the trial is usually to follow, besides the further consideration of the action (a).

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(2) *In re Bowen, Bennet v. Bowen*, 20 Ch. Div. 538.

(a) *Gatti v. Webster*, 12 Ch. Div. 771.



§ 76. *Judgment. — For Default of Appearance to Writ.*—It is true, that in actions respecting matters exclusively assigned (Act 1873, § 34) to the Chancery Division, judgment for default of appearance cannot generally be signed, but the action is in general to proceed in the ordinary way upon the plaintiff's filing an affidavit of service of the writ (xiii. 9). There are, however, certain actions in the Chancery Division in which judgment for default of appearance may be signed, viz.:—

(1.) In an action for the recovery of land (xiii. 7), with or without mesne profits or arrears of rent (xiii. 8), and with or without damages for breach of agreement (xiii. 8).

(2.) In an action for the detention of goods (xiii. 6), with or without pecuniary damages (xiii. 6).

(3.) In an action for pecuniary damages (xiii. 6).

(4.) In an action of debt or for liquidated damages where writ is specially indorsed (xiii. 3), and where writ is not specially indorsed (xiii. 5).

§ 77. *Judgment. — For Default of Pleading.*—There are various defaults of pleading upon which judgment may be obtained, and also various judgments obtainable for such defaults.

(a.) Upon plaintiff's default to deliver (when bound to deliver) a statement of claim:—

(1.) Judgment dismissing action with costs (xxix. 1)

(b.) Usually, however, the plaintiff will, upon terms, be allowed a short further time to deliver his statement of claim.

(b.) Upon defendant's default to deliver a defence or demurrer to a foregoing statement of claim:—

(2.) Such judgment as the plaintiff is entitled to on his statement of claim (xxix. 10). This is the usual judgment in an action in the Chancery Division.

(3.) Judgment for the recovery of land (xxix. 7), with or without mesne profits or arrears of rent (xxix. 8), and with or without damages for breach of covenant (xxix. 8).

(4.) Judgment for the value of goods detained (xxix. 4), with or without pecuniary damages (xxix. 4).

(5.) Judgment for pecuniary damages (xxix. 4).

(6.) Judgment for amount of debt or of liquidated damages (xxix. 2), whether writ specially indorsed or not.

(c.) Upon third party's default to deliver (when bound to deliver) any pleading also upon plaintiff's default to deliver a reply (c):—

(7.) Such judgment as upon the pleadings the opposite party is entitled to (xxix. 13).

In the second of the seven forms of judgment above enumerated, where one or some only (and not all) of several defendants are the defaulters, the plaintiff may set the action down against such defaulters either immediately upon the default or afterwards when he enters the action for trial or sets same down on motion for judgment against the other (non-defaulting) defendant or defendants (xxix. 11) (d).

Of these judgments, the first and seventh may be obtained on simple motion; but all the others can be obtained only upon motion for judgment duly set down.

The default of pleading upon which the seventh

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(c) *Lumsden v. Winter*, 6 Q. B. D. 850; *Graves v. Terry*, 9 Q. B. D. 170

(d) *Jackson v. Litchfield*, 8 Q. B. D. 474.

judgment is obtained will usually, if not always, be the default of third party to plead to some defendant's claim, counter-claim, or claim over, against him, as a *subsidiary* or *secondary* defendant, as these words are used respectively in §§ 37 and 38, *supra*.

All judgments obtained by default may usually be set aside, upon terms, where the default is satisfactorily explained or excused (*e*).

Where a party, being bound to plead, neither joins issue upon the last preceding pleading nor (with or without leave) pleads otherwise thereto, he is taken to have admitted the statements of fact in the pleading last preceding (xxix. 12); but this default of pleading, *semble*, does not entitle the non-defaulter to sign judgment (*f*), but operates only to close the pleadings.

§ 78. *Judgment.—For Default of Appearance at Trial.*—

(*a*.) If defendant fails to appear at the trial when the action is called on, judgment may be given for the plaintiff upon his proving his claim so far as the burden of proof rests on him (xxxvi. 18).

(*b*.) If plaintiff fails to appear at the trial when the action is called on, judgment simply dismissing the action (*g*), may be given to a defendant who has not counter-claimed, without either swearing the jury (when there is one) or adducing evidence (xxxvi. 19); and judgment may be given for a defendant who has counter-claimed upon his proving his counter-claim so far as the burden of proof rests on him (xxxvi. 19).

*Semble*, it is not necessary for the defendant to prove

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(*d*) *Watt v. Barnett*, 3 Q. B. D. 183, 363; *Burgoine v. Taylor*, 9 Ch. Div. 1.

(*e*) *Litton v. Litton*, L. R. 3 Ch. Div. 793.

(*f*) *Robinson v. Chadwick*, 7 Ch. Div. 878.

in such a case that he has been served with notice of trial (g).

§ 79. *Judgment.—On Admissions in the Pleadings.*—Any party to any action may at any stage thereof obtain, on simple motion (h), or even, *semble*, on summons, such order as he is entitled to, upon any admission or admissions of facts in the pleadings (xl. 11); and such order may be obtained so soon as the right of the party appears on the pleadings (xl. 11); the order may be either upon terms or absolute.

But *nota bene*, the admission must not be of something impossible in law (i).

*Semble*, judgment as on admissions is not to be obtained where any party, by omitting to join issue with or otherwise plead to the last preceding pleading, is taken to have admitted same; but that operates merely as a close of the pleadings (xxix. 12) (j).

But where issues arise between third party and plaintiff or defendant, if any of them make default to the pleading of the other or others, then judgment may be given on the pleadings without any evidence (xxix. 13).

Also, *semble*, when a defendant has refused compliance with an order to answer interrogatories or for discovery or inspection of documents, upon an order being (as it may be) made to strike out his defence (xxxi. 20), judgment may thereupon be obtained, on the statement of claim as admitted, *i.e.*, for default of defence.

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(g) *James v. Crow*, 7 Ch. Div. 410; and *quære Cockle v. Joyce*, 7 Ch. Div. 56.

(h) *In re Barker's Estate*, 10 Ch. Div. 162.

(i) *Chilton v. Corporation of London*, 7 Ch. Div. 735.

(j) *Litton v. Litton*, L. R. 3 Ch. Div. 793; and see *Graves v. Terry*, 9 Q. B. D. 170.

*Nota Bene.*—An order similar to judgment on admissions in the pleadings may, in certain cases, be obtained upon admissions in the evidence, *i.e.*, affidavits (*k*).

§ 80. *Judgment.*—*At Trial of Action.*

(a.) Upon the trial of an action (whether with or without a jury), the judge may at [or after] the trial direct that judgment be entered *simpliciter* for any or either party (xxxvi. 22, Dec. 1876).

[This is the usual judgment in a Chancery action (and also in an action at Common Law), when there are disputed questions of fact, which have to be decided upon evidence. And when judgment has so been directed to be entered *simpliciter*, any party may apply to the Court of Appeal (xl. 4a) to set aside such judgment and to enter another judgment instead thereof (xl. 4a); and in this case no *leave* to apply to the Court of Appeal need be reserved in the original direction to enter judgment (xl. 4a).]

(b.) Upon the trial of an action (whether with or without a jury), the judge may at [or after] the trial adjourn same for further consideration (xxxvi. 22, Dec. 1876).

(c.) Upon the trial of an action (whether with or without a jury), the judge may at [or after] the trial leave any party to move for judgment (xxxvi. 22, Dec. 1876).

(d.) Upon the trial of an action (whether with or without a jury), the judge may at the trial direct judgment to be entered for either or any of the parties subject to leave to move (General Procedure).

(e.) Where a defendant has in his defence raised any set-off or counter-claim, if, upon the trial of the action, the balance is in favour of the defendant, the judgment is to be given for the defendant for the balance (xxii. 10).

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(*k*) *London Syndicate v. Lord*, 8 Ch. Div. 84; *Freeman v. Cox*, 8 Ch. Div. 148.

§ 81. *Judgment.—On Motion subsequent to Trial.*

(a.) Upon the trial of an action (whether with or without a jury), where the judge has at the trial directed judgment to be entered subject to leave to move (xl. 2), in such a case the party to whom such leave has been reserved is to set down the action on motion for judgment, and is to give to the other party notice of such setting down within ten days after the trial or within the time specified in the reservation of leave (xl. 2). The notice of motion for judgment is to state the grounds of the motion; also, the relief sought; and it is to specify that the motion is pursuant to leave reserved (xl. 2).

(b.) Upon the trial of an action (whether with or without a jury), where the judge has abstained from making any direction at the trial as to entering judgment for either party, in such a case the plaintiff may within ten days after the trial (xl. 3) set down the action on motion for judgment and give notice of such setting down to the defendant; and if the plaintiff does not do so, then the defendant may set it down so, and give to the plaintiff notice of such setting down (xl. 3).

(c.) Upon the trial of an action (whether with or without a jury), where the judge has directed judgment to be entered *simpliciter* for any party, the other party or parties may, without any leave reserved, apply to the Court of Appeal or (as the case may require) to the Divisional Court, to set aside such judgment and to enter any other judgment (xl. 4a), upon the ground that the judgment is wrong (where there is no jury) upon the finding as entered, and (where there is a jury) by reason that the finding of the jury has been wrongly entered by the judge, having regard to the findings of the jury upon the questions submitted to them (xl. 4a).

(d.) Unless where there is other express provision to the contrary, the judgment of the court is to be

obtained on motion for judgment (xl. 1). And no judgment shall be entered after a trial without the order of a court or judge (xxxvi. 22).

(e.) Upon the trial (under any order in that behalf) of issues or an issue, the judge directs, of course, the finding only to be entered; and in such a case, the plaintiff may within ten days after the trial (xl. 7) set down the action on motion for judgment upon the findings and give notice of such setting down to the defendant; and if the plaintiff does not do so, then the defendant may set it down so, and give to the plaintiff notice of such setting down (xl. 7); and where there are several of such issues, and one or some only of them have been tried, either party (if so advised) may with leave and upon terms set down the action on motion for judgment upon the findings already found without waiting for the finding of the other issue or issues (xl. 8).

[*Seem*, this procedure is the course to pursue in order to obtain judgment or other order upon the report of a referee. See § 84, *infra*.]

§ 82. *Judgment.—On Motion without Trial.*—Upon any motion for judgment, the court may adopt one or other of several courses, viz. :—

(a.) If satisfied that it has before it all the materials necessary for finally determining the question or questions in dispute, or any of them, or for awarding the relief sought, the court may give judgment accordingly (xl. 10) (1).

(b.) If satisfied that it has *not* sufficient materials before it to give such judgment as aforesaid, the court may direct the motion to stand over for *further consideration*, and that in the meantime such issues or

questions be tried, and such accounts and inquiries be taken and made, as it chooses to direct (xl. 10).

*Nota Bene.*—A very large proportion of actions in the Chancery Division assume this character, or are set down as motions for judgment in order to take judgment thereon for accounts, inquiries, and the like without any trial; and almost invariably the further consideration of such actions is reserved. Also, many judgments in Chancery are obtained upon minutes of the proposed judgment passed between and assented to by the respective counsel; and other judgments both at law and in equity are obtained by consent simply (*m*).

§ 83. *Judgment.—On Motion for New Trial.*—Upon any motion for a new trial, the court may adopt one or other of several courses, viz. :—

(*a*.) If satisfied that it has before it all the materials necessary for finally determining the question or questions in dispute, or any of them, or for awarding the relief sought, the court may give judgment accordingly (xl. 10) (*n*).

And *vice versa*, upon application by way of appeal, the court may order a new trial to be had, instead of determining the question on the appeal (xviii. 5*a*, March 1879).

(*b*.) If satisfied that it has *not* sufficient materials before it to give such judgment as aforesaid, the court may direct the motion to stand over for *further consideration*, and that in the meantime such issues or

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(*m*) *Att.-Gen. v. Tomline*, 7 Ch. Div. 388; *In re Rees*, *Rees v. George*, 15 Ch. Div. 490; and see *Wiley Brick Co.*, 20 Ch. Div. 130.

(*n*) *Jones v. Hough*, 5 Exch. Div. 115; *Hamilton v. Johnson*, 5 Q. B. D. 263; *Potter v. Cotton*, 5 Exch. Div. 137; *Connecticut Co. v. Moore*, 6 App. Ca. 644; *Williams v. Mercier*, 9 Q. B. Div. 337.



questions be tried, and such accounts and inquiries be taken and made, as it chuses to direct (xl. 10).

[See also § 122, *Motion.—For Rule or Order to Show Cause.*]

§ 84. *Judgment.—Upon Trial before Referee.*—By consent of all parties, any question or issue of fact in any civil cause or matter may be referred to a referee for him to try same, and to report the result of his trial (Act 1873, §§ 57, 58); and by compulsory order of the court or a judge, any question or issue of fact, or any question of account, in any civil cause or matter requiring either a minute examination of documents or of accounts, or a scientific or local investigation, may be referred to a referee for him to try same, and to report the result of his trial (Act 1873, §§ 57, 58). And the referee may, before the conclusion of the trial before him, or by his report, submit any question for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom (xxxvi. 34, March 1879).

In either case the report may be either adopted or set aside by the court; but if not set aside, it is equivalent to the verdict of a jury (Act 1873, § 58); and apparently judgment may be obtained upon it by subsequent motion for judgment, the judgment or order being entered in such form as the court directs (xxxvi. 34, March 1879). And when it is intended to ask the court to vary the report, a motion to that effect should be made, and the motion will come on with the further consideration of the action (o).

And regarding such references (whether voluntary or compulsory) and such report, the court or judge has

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(o) *Burrard v. Calisher*, 19 Ch. Div. 644.

all the powers of the Common Law Procedure Act, 1854 (Act 1873, § 59); and, in addition, the court or judge either (1) may require the referee to explain or give reasons for his report, and may remit to him or to some other referee the cause or matter, or any part thereof, for re-trial or further consideration, or (2) may itself decide the question on the evidence taken before the referee, with or without additional evidence as the court may direct (xxxvi. 34, March 1879) (p).

*Nota Bene.*—No compulsory reference of the entire action can be made under the Judicature Acts (q); unless, *semble*, where the principal issue is a mere question of accounts, and the other issues are incidental thereto (r).

§ 85. *The Judgment.*—*Interlocutory Order for Account.*—Where the writ is indorsed with a claim for an account (being the ordinary account of a trust or partnership, or such like), then immediately after the time limited for appearance to the writ, and upon a simple summons at chambers, supported by an affidavit stating the plaintiff's grounds of claim for the account (xv. 2), an order for the account will be made,—

(a.) Where defendant has not appeared,—as a matter of course; and,

(b.) Where defendant has appeared,—unless the defendant satisfies the court or a judge that the plaintiff's right to the account depends upon the decision (in his favour) of some preliminary question (xvi. 1).

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(p) *Dunkirk Colliery Co. v. Lever*, 9 Ch. Div. 20. And see *Jones v. Wedgewood*, 19 Ch. Div. 56; *Mercier v. Popperell*, 19 Ch. Div. 58.

(q) *Longman v. East*, 3 C. P. Div. 142; *Pontifex v. Severn*, 3 Q. B. D. 295; and *Mellin v. Monica*, 3 Exch. Div. 144.

(r) *Ward v. Pilley*, 5 Q. B. D. 427; and see *Braynton v. Yates*, W. N. 1880, p. 150.

The order directing the account (if any order is made) will include all usual directions (xv. 1); *semble*, a statement of claim is necessary in these cases (s).

Also, and at any stage of the proceedings, the court or a judge will, and that either upon ordinary motion (the most usual course), or upon motion for judgment, make an interlocutory order for any necessary accounts, and inquiries being taken and made, notwithstanding that, as regards the relief, or other relief, sought in the action, or the questions, or other questions, involved therein, it may be necessary for the action to proceed in the ordinary way (xxxiii.)

§ 86. *The Judgment.—Where Signed for Costs only.*

(a.) Where an action is wholly discontinued by a plaintiff, or any matter involved therein is withdrawn by the plaintiff, then the defendant may (if his taxed costs are not sooner paid) sign judgment for such costs, in respect either of the total discontinuance or of the matter withdrawn (xxiii. 2).

(b.) Similarly, *semble*, where the defendant is successful in defeating the plaintiff's action, and the defendant has not asked (or not succeeded in getting) any substantive or independent relief on counter-claim.

§ 87. *Judgment.—Entry of.*—When the court pronounces judgment, or when a judge in court does so, the judgment as entered is to be dated as of the day on which it is pronounced, and takes effect from that date (xli. 2); but in other cases, the judgment is to be dated and to take effect only as from the day that the pleadings required to be left on the entry (xli. 1) are in fact left (xli. 3).<sup>\*</sup> All (if any) undertakings, *e.g.*,

(s) *In re Huckwell, David v. Dalton*, W. N. 1879, p. 86.

<sup>\*</sup> Of judgments, the entry is usually in the Central Office; and if the action is one proceeding in the District Registry, then an office copy merely of the judgment is transmitted to the Registry to be filed therein. But all orders made by the District Registrar himself, and

an undertaking not to appeal, should be embodied in the judgment or order (*t*). Any clerical error or accidental slip or omission in a judgment or order may be amended on motion at any time; and without appeal (xlii, Dec. 1879) (*u*).

§ 88. *Judgment of Non-suit.—Effect of.*—In general, a judgment of non-suit is to have the same effect as a judgment for the defendant upon the merits (xli. 6), but the court may in any particular instance otherwise direct (xli. 6); also, in any case of mistake, surprise, or accident, any judgment of non-suit may be set aside upon terms (xli. 6) (*v*).

#### SECTIONS 89–109.

#### THE EXECUTION.—THE FORMAL PROCEDURE WITH THE SUMMARY PROCEDURE INCIDENTAL THERE TO.

§ 89. *The Execution.—Varieties of.*—The varieties of writs of execution are the following:—

- (1.) Writ of *Fi. Fa.*;
- (2.) „ *Elegit*;
- (3.) „ *Possession*;
- (4.) „ *Delivery*;
- (5.) „ *Sequestration*;
- (6.) „ *Attachment*;
- (7.) „ *Capias*;
- (8.) „ *Ca. Sa.*
- (9.) Writs assistant to other writs, viz.,—
  - (a.) Writ of *Venditioni Exponas*;
  - (b.) „ *Distringas nuper vicecomitem*;

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all judgments in actions proceeding in the District Registry, which are signed by consent, or for default of appearance to writ, or of pleading, are entered in the District Registry (xxxv. 2).

(*t*) *In re Hull and County Bank, Trotter's Claim*, 13 Ch. Div. 26.

(*u*) *Fritz v. Hobson*, 14 Ch. Div. 542; *In re Savage*, 15 Ch. Div. 557.

(*v*) *Poyser v. Minors*, 7 Q. B. D. 329.

- (c.) Writ of *Fi. fa. de bonis ecclesiasticis*;
- (d.) „ *Sequestrari facias de bonis ecclesiasticis*;
- (e.) „ *Assistance*;
- (10.) Writ of *Distringas*, or Notice in the nature thereof.
- (11.) Charging order (on stock or shares); and,
- (12.) Garnishee order.

§ 90. *The Execution.*—*Judgments upon which it may issue.*—These are,—

- (1.) Judgments for recovery or payment of money (xlii. 1).
- (2.) Judgments for payment of money into court (xlii. 2).
- (3.) Judgments for the recovery of the possession of land (xlii. 3), or for the delivery of the possession of land (xlii. 3).
- (4.) Judgments for the recovery of any property other than land or money (xlii. 3); and,
- (5.) Judgments requiring any person to do (or to abstain from doing) any act other than the payment of money (xlii. 5).

The judgment need not be final, but may be interlocutory,—it being remembered that not all executions issue on all judgments (*w*). Moreover, every order of the court or a judge may be enforced in the same manner as a judgment to the like effect (xlii. 20). Occasionally a supplemental suit becomes necessary to enforce an order or judgment (*x*).

§ 91. *The Execution.*—*The Mode of Issuing.*—Produce to the proper officer either the judgment or an office copy thereof, showing the date of entry of judg-

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(*w*) *Widgery v. Tepper*, 6 Ch. Div. 364; *Cremetti v. Crom*, 4 Q. B. Div. 225.

(*x*) *Al.-Gen. v. Birmingham Drainage Board*, 17 Ch. Div. 685.

ment (xlii. 9). Also, file a præcipe signed by or on behalf of the party (or his solicitor) issuing it (xlii. 10), and containing the following particulars, viz. :—

- (1.) Title of action and reference to record ;
- (2.) Date of judgment ;
- (3.) Date of order (if any necessary) giving leave to issue ; and,
- (4.) Names of the parties against whom (or of the firms against whose goods) the writ is to issue (xlii. 10).

The writ of execution is dated as of the day of issue (xlii. 12).

The writ of execution is to be indorsed as follows :—

(a.) If party issue same in person, indorse a memorandum to that effect, and all particulars of his place of residence, not forgetting the number (if any) in the street (xlii. 11).

(b.) If party's solicitor issue same, indorse the name and either the residence or the office of such solicitor (xlii. 11).

(c.) If agent for party's solicitor issue same, indorse name and either the residence or the office of the party's solicitor, and indorse also the name and residence of such agent (xlii. 11).

The writ of execution (when it is for the recovery of money) is to be further indorsed with a direction to the officer to levy the sum (specifying same) due under judgment, and also interest (when interest claimed) at £4 per cent., or other (if any) the rate of interest for which the judgment was agreed (xlii. 14) ; but, *semble*, the direction does not extend to poundage, or fees, or expenses of execution, which are to be levied without any such direction (xlii. 13).

In the writ itself, that is, in the body thereof, the

directions to the officer are more explicitly contained, being suited in each case to the form of writ that is wanted (whether *fi. fa.*, *elegit*, or other form); and the costs (if any) recovered in the action, together with interest thereon at the rate of £4 per cent. per annum, computed from the date of the Taxing Master's certificate (y), are also therein particularly directed to be levied (Forms, Appendix F., Judicature Acts).

§ 92. *The Execution.—The Time of Issuing.*—Immediately upon entry of judgment for any sum of money, or for any costs (being first taxed), either *fi. fa.* or *elegit* may issue, unless payment of either is by the judgment deferred beyond the date of such entry (xlii. 15). But in such cases, by special order, execution may issue sooner than entry (xlii. 15), or may be stayed until any time (xlii. 15).

In judgments of other sorts, the time for doing the act is, in general, expressed in the judgment.

As between the original parties to the judgment, execution may issue at any time within six years after recovery of judgment (xlii. 18), and afterwards by leave only (xlii. 19).

No execution may issue for the first time after the expiration of twenty years after recovery of judgment.

The writ (remaining unexecuted) holds good for one year only after issue (xlii. 16), but may (before it has expired) be renewed by leave for one year more from the date of the renewal, and so on (xlii. 16); and such renewal and successive renewals have this effect, viz., the writ of execution takes effect, and is entitled to priority, as from the date of the original delivery thereof (xlii. 16).

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(y) *Schroeder v. Cleugh*, 46 L. J. C. P. Div. 365; and see *Smith v. Keal*, 9 Q. B. Div. 340 (as to indicating the property).

In certain cases, a plaintiff may have judgment and execution thereon against one or more (short of all) of several defendants, and proceed with his action in the ordinary way against the other defendants; that is to say, in the following cases:—

(1.) To a writ specially endorsed (under iii. 6), with the particulars of debt or liquidated damages, judgment and execution against the non-appearing defendant or defendants (xiii. 4).

(2.) To a writ specially indorsed as aforesaid (under iii. 6), if (after plaintiff has delivered his statement of claim) any one or more (short of all) of several defendants, having leave to defend, make default of pleading to the statement of claim, judgment and execution against such defaulting defendant or defendants (xxix. 3).

(1a.) To a writ specially endorsed as aforesaid (under iii. 6), if one or more (short of all) of the defendants obtain leave to defend, and the other or others do not, judgment and execution against the latter or against these latter (xiv. 5).

On the other hand, in an action specially endorsed as aforesaid, execution on judgment for part, where defendant has leave to defend as to the other part of the action (xiv. 4), is to be suspended as a general rule, pending the defence as to the other part (xiv. 4); and similarly, in effect, on interlocutory judgment for default of pleading (xxix. 5), in an action for detention of goods or pecuniary damages, or both (z).

§ 93. *The Execution.—Amount to be Levied.*—The writ of execution (when it is for the recovery of money)

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(z) *Dennis v. Seymour*, 4 Exch. Div. 80.



directs (in an indorsement thereon) that the officer shall levy the sum (specifying same) due under the judgment, and shall also levy interest (where interest claimed) at £4 per cent., or other (if any) the rate of interest for which the judgment was agreed (xlii. 14); and in addition, there may be levied the poundage, and fees, and expenses of execution (xlii. 13).

And upon every writ, the costs recovered, together with interest thereon at the rate of £4 per cent. per annum, computed from the date of the Taxing Master's certificate (a), may likewise be levied, and are in the body of the writ expressed to be thereby directed to be levied (Forms, Appendix F., Judicature Acts).

§ 94. *The Execution.—The Writ of Fi. Fa.*—This is the commonest form of execution, being applicable to the seizure of personal (but not of real) property. The writ is to have the same force and effect, and is to be executed in the same manner, as before the Judicature Acts, 1873–75 (xliii. 1). And in aid of it, all the various writs that were theretofore issuable in aid of it continue so issuable (xliii. 2).

§ 95. *The Execution.—Fi. Fa. against Garnishee upon Order to attach Debts.*—Execution by *fi. fa.* against a garnishee may issue by order of the court or a judge (xlv. 4), without any previous writ or process, to levy the amount of any judgment debt,—to the extent of the moneys or debts belonging to the judgment debtor in the hands of or owing from such garnishee (xlv. 4); and for the purpose of ascertaining such moneys or debts, the court or a judge will, upon the application of the judgment creditor, make (when necessary) an order against the judgment debtor for his examination *vidâ voce* before an officer of the court or special

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(a) *Schroeder v. Cleugh*, 46 L. J. C. P. Div. 365.

examiner (xlv. 1), and may also order the production of books and documents (xlv. 1). The garnishee may, however, forestall such execution, by appearing to the garnishee order *nisi* hereinafter mentioned, and paying into court the amount of the judgment debt (to the extent of such moneys or debts as aforesaid); and the court or a judge will not issue immediate execution, if the garnishee, having appeared as aforesaid, *bond fide* disputes the fact of any such moneys being in his hands or of any such debts being due from him to or on behalf of the judgment debtor (xlv. 5), but the court or a judge may in that case issue such execution (xlv. 7), subject to the determination of any issue or question against or affecting the garnishee (xlv. 5), and also as against (when necessary) any third person whom the garnishee alleges to be the owner of, or to have any lien on, the moneys (if any) in his hands, or the debt (if any) owing from him (xlv. 6).

The applicant applies in the first instance *ex parte* upon summons or motion supported with an affidavit by himself or his solicitor (xlv. 2), and obtains a garnishee order *nisi*, in which order (or in some subsequent order) the court or a judge further directs the garnishee, and any such third person as aforesaid, to appear and show cause against the order *nisi* (xlv. 2, 6).

The effect of the garnishee order *nisi* is (like that of a charging order *nisi*) to bind, as from the date of service of the order (*b*), all [moneys and] debts [in the hands of or] owing from the garnishee to the judgment debtor (xlv. 3).

Upon failure to appear to the order requiring appearance, the garnishee order *nisi* becomes instantly

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(b) *In re Stanhope Silkstone Collieries*, 11 Ch. Div. 160; *Ex parte Pillers, in re Curtoys*, 17 Ch. Div. 653.

absolute as against the person so defaulting, whether such defaulter be the garnishee himself (xlv. 4) or such third party as aforesaid (xlv. 6).

The garnishee is discharged,—as against the judgment debtor (xlv. 8) and also as against such third party (xlv. 7),—by any execution levied upon the garnishee (xlv. 8); and,—but, *semble*, only as against the judgment debtor,—by any payment made to forestall such execution (xlv. 8), even though the judgment should be afterwards reversed (xlv. 8).

*N.B.*—*Foreign Attachment* is a mere process (in certain city courts) to compel a defendant to appear to the process of the court (c).

§ 96. *The Execution.*—*The Writ of Elegit.*—Next to the writ of *fi. fa.*, this is the commonest form of execution, being applicable to the seizure (paramountly) of real property and putting the judgment creditor in possession thereof, together also with (at a price) all the goods and chattels of the debtor (other than his oxen and beasts of the plough) (d). The writ is to have the same force and effect, and is to be executed in the same manner, as before the Judicature Acts, 1873–75 (xliii. 1). And in aid of it, all the various writs that were theretofore issuable in aid of it continue so issuable (xliii. 2).

§ 97. *The Execution.* — *The Writ of Possession.* — Issues for the recovery of the possession of land (xlii. 3), or for the delivery of the possession of land (xlii. 3).

(a.) The writ of possession, when the judgment is in

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(c) *Levy v. Lovell*, 11 Ch. Div. 220; 14 Ch. Div. 234; *Ex parte Sear*, in *re Price*, 17 Ch. Div. 74; *Mayor of London v. London Joint Stock Bank*, 6 App. Ca. 393.

(d) *Ex parte Abbot*, in *re Gourlay*, 15 Ch. Div. 447.

form for the delivery of possession by a person in that behalf named in the judgment to another person, issues in the following manner:—

The applicant for it must have first duly served the judgment (xlvi. 2), and the possession not having been sooner delivered pursuant to the judgment, the applicant for the writ of possession then files an affidavit of service of the judgment, and of such non-delivery (xlvi. 2); and thereupon the writ of possession issues without any order (xlvi. 2).

(b.) The writ of possession, when the judgment is in form for the recovery of possession, issues as it used formerly to issue in an action of ejectment at common law (xlvi. 1), that is to say, on the fifth day in term next after the verdict, or within fourteen days after such verdict, whichever shall first happen, or (if so ordered at the trial) on any day within the fifth day in term next after the verdict (C. L. P. Act, 1852, § 185); and before issuing execution, the proceedings in the action need not be entered on any roll, but a mere *incipitur* of the judgment is to be made on paper (C. L. P. Act, 1852, § 206). [See generally 2 Chitty's Practice, 12th ed. pp. 1044–1047; also § 136, *infra*.]

§ 98. *The Execution.—The Writ of Delivery.*—Issues for the recovery of any property other than land or money (xli. 4).

It issues and is enforced in the manner in which it used formerly to issue and be enforced in an action of detinue at common law (xlix.), that is to say, it issues only by leave of the court (C. L. P. Act, 1854, § 78), and directs the sheriff to deliver the specific property (if it can be found), and (if it cannot be found) then to distrain all the lands and chattels of the defendant until he do render up the specific property, or until the assessed value of such specific property is obtained (C. L. P. Act, 1854, § 78), the costs being

levied on the same or on some subsequent several execution (C. L. P. Act, 1854, § 78). [See generally 1 Chitty's Practice, 12th ed. pp. 7107-13.]

§ 99. *The Execution.—The Writ of Attachment.*—No writ of attachment is to be issued without leave (xliv. 2); the leave is to be obtained on motion upon notice (xliv. 2) (e). A writ of attachment may issue in any of the following cases:—

(1.) To enforce the doing, or forbearing from, any act (other than the payment of money) ordered to be done or forborne (xlii. 5) (f).

(2.) To enforce the payment into court of money ordered to be so paid, in any case in which imprisonment for debt is authorised by law (xlii. 2; Debtors' Act, 1869, §§ 4-7) (g).

(3.) To enforce the recovery of any property not being either land or money (xlii. 4).

The writ of attachment has the same effect as the old writ of attachment in Chancery (xliv. 1),—that is to say, the person when once attached (*i.e.*, taken and put into prison, or, if already in prison when found, then detained further in prison) cannot be bailed out, but must remain in prison until he has cleared his contempt by performing the act required of him (or, in a proper case, expressing contrition for his contempt), and by paying (unless a pauper) the costs of the contempt.

*Notâ Bene.*—The writ of attachment is not a penal writ; therefore it is relievable under Debtors' Act,

(e) *Eynde v. Gould*, 9 Q. B. D. 335.

(f) *Pooley v. Whetham*, 15 Ch. Div. 435; *Ex parte Langley, in re Bishop*, 13 Ch. Div. 110.

(g) *Chard v. Jervis*, 9 Q. B. D. 178; *Brooks v. Edwards*, 21 Ch. Div. 230.

1878 (*h*); and in a proper case, the court will, in lieu of committal, *i.e.*, attachment, direct payment of the debt by instalments (*i*).

Attachment may issue against a solicitor (for misconduct in an action) in the following cases:—

(1.) Where he has given a written undertaking to appear on behalf of a defendant to the writ of summons, and does not enter such appearance accordingly (xii. 14); and,

(2.) Where he has been served with an order against his client for discovery or inspection of documents, and he neglects [inexcusably] to bring the order to the notice of his client (xxxi. 22).

Any party failing to comply with an order to answer interrogatories, or to make discovery or inspection of documents, is liable to attachment (xxxi. 20); and service of the order, or a true copy thereof, but not an imperfect copy (*j*), on his solicitor is sufficient service to found an application for the attachment (xxxi. 21).

A referee cannot enforce any of his orders by attachment (xxxvi. 33); and neither can a master (liv. 2); and neither can a district registrar (xxxv. 4, and liv. 2).

§ 100. *The Execution.—The Writ of Sequestration.*  
—A writ of sequestration may issue without leave (xlvi.) in the following cases:—

(1.) To enforce the doing of any act (other than the

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(*h*) *Barrett v. Hammond*, 10 Ch. Div. 285; *Holroyde v. Garnett*, 20 Ch. Div. 532; distinguishing *Morris v. Ingram*, 13 Ch. Div. 338.

(*i*) *Esdaile v. Visser*, W. N. 1879, p. 52; *Dillon v. Cunningham*, L. R. 8 Exch. 23; *Hewitson v. Sherwin*, L. R. 10 Exch. 53.

(*j*) *In re Holt*, W. N. 1879, p. 48; and see *Re a Solicitor*, 14 Ch. Div. 152.

payment of money into court) ordered to be done within a limited time (xlvi.)

(2.) To enforce the payment of money into court ordered to be so paid within a limited time (xlvi.)

(3.) To enforce the recovery of any property not being either land or money (xlii. 4).

But the writ may not issue, excepting by leave, for the recovery of costs (xlii. 2, April 1880) (*k*).

The order sought to be enforced must have been served, and the time specified in the order must have expired, before the writ can issue (xlvi.); nor can a sequestration issue, *semble*, unless to a previous writ of attachment the sheriff has made a return of *non est inventus* (§ 106, *infra*), or unless it issue under sect. 8 of Debtors' Act, 1869, or unless the court has been asked, and has refused, to issue a previous attachment (*l*).

The writ of sequestration has the same effect as the old writ of sequestration in Chancery (*m*); and the dealing by the court with the proceeds of the sequestration is also still the same (xlvi.), that is to say, the sequestrators appointed (usually *four* in number) enter upon the real estate, and receive and sequester and take the rents and profits thereof, and also all the personal estate of the person who has disobeyed the order of the court, and who is in contempt for so doing; and the court may subsequently direct a sale of the goods or any of them, and will also direct the application of all rents and of the proceeds of all sales. The sequestrators are accountable to the court.

### § 101. *The Execution.—The Writ of Capias.*—This

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(*k*) *Snow v. Bolton*, 17 Ch. Div. 433; and see generally *Ex parte Nelson, in re Hoare*, 14 Ch. Div. 41.

(*l*) *Sprunt v. Pugh*, 7 Ch. Div. 567.

(*m*) *In re Slade*, 18 Ch. Div. 653.

writ may still issue under the new practice (xlii. 6), but only in cases in which, and for purposes for which, it would have been issuable before the commencement of that practice, that is to say,—

It is issued (no longer as a means of commencing an action, but) after the commencement of the action, and upon the application of the plaintiff only (n), and by leave of the judge, in cases where the cause of action amounts to £50 and the defendant is about to quit England (1 & 2 Vict., c. 110, § 3; and Debtors' Act, 1869, and Absconding Debtors' Act, 1870) (o). The form of writ prescribed by 1 & 2 Vict., c. 110, § 3, must be rigorously adhered to. [See generally 1 Chitty's Practice, 12th ed. pp. 765-777.]

§ 101a. *The Execution.*—*The Writ of Capias ad Satisfaciendum.*—This writ (commonly called *ca. sa.*) is nowhere mentioned in the Acts or Orders or Rules, but appears to be included among the general words (xlii. 23). [See generally 1 Chitty's Practice, 12th ed. pp. 694-710; and Debtors' Act, 1869, and Absconding Debtors' Act, 1870.]

§ 102. *The Execution.*—*Writs Assistant to other Writs.*

(a.) *Venditioni Exponas*, the writ of, issues where the sheriff upon an execution by *fi. fa.* has taken goods, and he returns that he has taken same, but that they remain in his hands for want of buyers. The writ is really only a direction to the sheriff to go on in a particular manner, and to do his duty at all costs and hazards (1 Chitty's Practice, 12th ed. pp. 678, 679).

(b.) *Distringas nuper vicecomitem*, the writ of, issues to the successor in office of a sheriff, when the previous sheriff has returned that he has taken goods, and that

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(n) *Williams v. Griffith*, 3 Exch. 584.

(o) *Ex parte Gutierrez, in re Gutierrez*, 11 Ch. Div. 289.



same remain in his hands for want of buyers; and it directs the new sheriff to distrain the old (*nuper*) sheriff (*vicecomitem*), so as to compel him to do his duty by effecting a sale at all costs and hazards (1 Chitty's Practice, 12th ed. pp. 679, 680).

(c) *Fi. Fa. de Bonis Ecclesiasticis*, the writ of, issues where the sheriff has returned upon an ordinary *fi. fa.* that the debtor is a beneficed clerk, and is directed to the bishop of debtor's diocese, and the bishop executes the writ forthwith by appointing sequestrators of the profits of the benefice (2 Chitty's Practice, 12th ed. pp. 1283, 1284).

(d.) *Sequestrari Facias de Bonis Ecclesiasticis*, the writ of, issues (at the option of the creditor) in lieu of the writ of *fi. fa. de bonis ecclesiasticis*, and in the like case; it commands the sheriff to enter into the rectory and parish church, and sequester the profits thereof, and also all other the ecclesiastical goods of the debtor (2 Chitty's Practice, 12th ed. p. 1284).

(e.) *Assistance*, the writ of, may issue (at the option of the plaintiff) in lieu of the writ of attachment, where a decree or order directing possession of property to be given has been disobeyed. The writ is directed to the sheriff, who is to put the plaintiff into the possession; and no demand of possession prior to issuing the writ is necessary. The writ issues with leave only, to be obtained on *ex parte* motion (see 1 Dan. Ch. Pract., 5th ed. 923, 924).

§ 103. *The Execution.*—*Distringas Notice in lieu of Writ of Distringas.*—The writ of *distringas* issued out of the London office, out of which writs of summons were issued (xlvi. 2). Any person might issue it who claimed to be interested in any stock transferable at the Bank of England standing in the name of any other person (xlvi. 2); and the writ issued upon filing an affidavit swearing to the interest of the applicant, and identifying the stock (Morgan's Chanc. Acts, 5th

ed. p. 586; 5 Vict., c. 5, § 5). The writ was confined to stock of the Bank of England, and application for an injunction was usually made under the statute 5 Vict., c. 5, which extended to shares as well as to stock, and of all public companies.

The writ of *distringas* as such has been abolished (xlvi. 2*a*, April 1880), and in lieu thereof the party serves upon the company an office copy of his affidavit and a duplicate notice sealed at the Central Office (xlvi. 3, April 1880). The forms of the affidavit and notice are given in the schedule to the rules of April 1880. The notice holds good for five years, and may be renewed (xlvi. 7 and 8, April 1880); but its effect ends with eight days after any request to the contrary effect of the notice, and an order of the court must in such a case be obtained before the eight days expired (xlvi. 10, April 1880). This notice in lieu of writ of *distringas* applies to shares as well as to stocks, and to all public companies whatsoever, and not merely to the Bank of England (xlvi. 3, April 1880).

§ 104. *The Execution.—Order Charging Stock or Shares.*—May be obtained from any Divisional Court, or from any judge (xlvi. 1), or even so far as it is *nisi*, from a Master (liv. 2*a*, Nov. 1878), and even from the District Registry (xxxv. 3*a*, April 1880). The order is obtained in the following manner:—The applicant applies *ex parte* for a rule to show cause (1 & 2 Vict., c. 110, § 14), and a rule or order *nisi* is at once made, upon an affidavit identifying the stock or shares, and verifying the fact of an unsatisfied judgment having been recovered against the party beneficially entitled to the stock or shares, whether the same stock or shares are standing in his (the judgment debtor's) own name, or in the name of a trustee for him (1 & 2 Vict., c. 110, §§ 14, 15), or in the name of the Paymaster-General, as a trustee for him (3 & 4 Vict., c. 82, § 1),

either alone or together with other persons (*p*), and the affidavit also, of course, makes out the right of the judgment debtor to the stock or shares in question, such interest being either in possession or in reversion, and either vested or contingent (3 & 4 Vict., c. 82, § 1).

The judgment debtor must show cause against the order *nisi* within the time specified in the order; and if he fail to show cause at all, or do not show enough cause against it, the order is made absolute, upon proof of service of the order *nisi* (1 & 2 Vict., c. 110, § 15).

*Nota Bene.*—An order charging stock or shares cannot be made absolute where the judgment debtor is dead when the order *nisi* is obtained (*q*).

§ 105. *The Execution.*—*Garnishee Order.*—The applicant for this order applies in the first instance *ex parte* upon summons or motion supported with an affidavit by himself or his solicitor (xl. 2; xxxv. 3a, April 1880), and obtains a garnishee order *nisi*, being an order charging, to the extent (at least) of the judgment debt, all moneys belonging to the debtor in the hands of the garnishee and all debts owing from the garnishee to the debtor (*r*). If necessary for the purposes of discovery, the court or a judge will, upon the application of the judgment creditor, make an order against the judgment debtor for his examination (*s*), *vivâ voce* before an officer of the court or special examiner, and for the production of books and documents (xl. 1).

The effect of the garnishee order *nisi* is (like that of a charging order *nisi*) to bind, as from the date of service of the order (*t*), all [moneys and] debts [in the hands

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(*p*) *South-Western Loan Co. v. Robertson*, 8 Q. B. D. 17.

(*q*) *Finney v. Hinde*, 4 Q. B. D. 102.

(*r*) *Chatterton v. Watney*, 16 Ch. Div. 378; 17 Ch. Div. 259.

(*s*) *Republic of Costa Rica v. Strousberg*, 16 Ch. Div. 8.

(*t*) *In re Stanhope Silkstone Collieries*, 11 Ch. Div. 160.

of or] owing from the garnishee to the judgment debtor (xlv. 3).

The garnishee order *nisi* may be made absolute in the following manner:—

(1.) If the garnishee do not appear to the order requiring him to appear and show cause against the order *nisi*, then that order is made absolute at once (xlv. 4).

(2.) If the garnishee do appear to such order requiring his appearance, and *bond fide* disputes the fact of any moneys belonging to the judgment debtor being in his hands, or any debts being due from him (the garnishee) to the judgment debtor (xlv. 5), or he or any one else (*u*) alleges some third person to be owner of or to have some lien on such moneys or debts (xlv. 6),—then as against such third person not appearing (when duly notified so to do), and also as against such third person duly appearing, and as against the garnishee, the order is made absolute, subject to the determination of any issue or question between the garnishee and the judgment debtor, and the (appearing) third person (xlv. 7).

The garnishee paying under any garnishee order (*semble*, whether *nisi* or *absolute*) is thereby discharged to the extent of such payment, as against the judgment debtor, even though the judgment should be afterwards reversed (xlv. 8) (*v*).

*Nota Bene.*—A garnishee order does not issue on judgment dismissing action for want of prosecution (*w*), nor against proceeds of judgment paid into County Court as a debt due from the Registrar of that court

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(*u*) *Roberts v. Death*, 8 Q. B. D. 319.

(*v*) *Mayor of London v. London Joint Stock Bank*, 6 App. Ca. 393.

(*w*) *Cremetti v. Crom*, 4 Q. B. D. 225.

to the judgment debtor (x), nor against debts owing to the debtor from a partnership described as such (y).

§ 106. *The Execution.—Order of Issuing Divers Writs.*—Nothing in the Judicature Acts and rules is to affect the order in which writs of execution may be issued (xlii. 24). That order has already appeared in the preceding sections.

§ 107. *The Execution. — Leave to Issue.* — When judgment is subject to any condition or contingency, upon fulfilment of the condition or happening of the contingency, the party entitled to the judgment is to demand satisfaction thereof from the other party liable thereto (xlii. 7); and failing such satisfaction, he may obtain leave from the court or a judge to issue execution on the judgment,—either as a matter of course (when the court or judge is satisfied that the right to execution has arisen), or (when the court or judge is not so satisfied), subject to the determination of any issue or question between the parties (xlii. 7).

Also, when judgment has been obtained against partners in the name of the partnership firm, an order may be made giving leave to issue execution against any person as a member of the firm (where the court or judge is satisfied that such person is a member of the firm), or (where the court or judge is not so satisfied) subject to the determination of any issue or question between the parties (xlii. 8) (z). But upon such a judgment no such leave is requisite to issue execution,—either (1) against the partnership property; or (2) against any person who on the pleadings is admitted to be a partner, or who has been adjudged to be one; or (3) against any person who has failed to

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(x) *Dolphin v. Layton*, 4 C. P. Div. 130.

(y) *Walker v. Rooke*, 6 Q. B. D. 631.

(z) *Clark v. Cullen*, 9 Q. B. D. 355.

appear to the writ of summons served upon him as a partner (xlii. 8).

Immediately upon entry of judgment for any sum of money or for any costs (being first taxed), either *fi. fa.* or *elegit* may issue, in general; and by special order, such execution may issue even before entry of judgment (xlii. 15).

As between the original parties to the judgment, execution may issue at any time within six years after recovery of judgment (xlii. 18), and afterwards by leave of the court or a judge only (xlii. 19); and although less than six years may have elapsed, if there has been any change by death or otherwise either in the parties entitled or in the parties liable to the execution, then an order of the court or a judge giving leave to issue the execution becomes necessary, and such order will be made immediately (if the court or a judge is satisfied that the applicant is entitled to it), or (if the court or a judge is not so satisfied) the order will be made subject to any issue or question being first determined between the parties (xlii. 19).

No writ of attachment issues without the leave of the court or a judge, to be applied for on notice to the party (xliv. 2).

§ 108. *The Execution. — Leave to Renew and Renewal of.*—The writ (if once issued) holds good (if it remains unexecuted) for one year only after issue, but may (before it has expired) be renewed by leave of the court or a judge for one year more from the date of the renewal, and so on (xlii. 16).

The renewal is effected either by sealing the writ of execution itself with a renewal seal (xlii. 16), or by

sealing with such seal a written notice of renewal signed by the party (or his solicitor), and delivering same, as so sealed, to the sheriff (xlii. 16).

§ 109. *The Execution.—Order to Stay.*—Immediately upon entry of judgment for any sum of money or for any costs (being first taxed), either *fi. fa.* or *elegit* may issue, in general; but by special order, either of such executions may be stayed until any time (xlii. 15). The application for the order to stay proceedings pending appeal is to be made in the first instance to the High Court (a), and is appealable (b).

And generally, upon the ground of facts which have arisen too late to be pleaded (and which would formerly have been the subject of a proceeding *audita querela*), any party liable to execution on any judgment given against him may have an order staying the execution (xlii. 22).

#### SECTIONS 110–117.

##### PROCEEDINGS IN CHAMBERS AND IN DISTRICT REGISTRIES, ALL BEING SUMMARY.

§ 110. *Chambers.—Modes of Proceeding in.*—Every application at Chambers is to be made by summons (liv. 1); and many people not parties to the action may have a right (or obtain leave) to attend proceedings in Chambers (c).

§ 111. *Chambers.—References to and from, and Appeals from.*—The Chief Clerk (or the Master) may refer a matter to the Judge (being a matter which he thinks proper for the Judge), and the Judge may

(a) *A. G. v. Swansea Tramways Co.*, 9 Ch. Div. 46, explaining *Cooper v. Cooper*, 2 Ch. Div. 492; and see *The Khedive*, W. N. 1879, 166.

(b) *Pollini v. Gray*, 12 Ch. Div. 438; *Wilson v. Church*, 12 Ch. Div. 454. And see *Brewer v. Yorke*, 20 Ch. Div. 669.

(c) *Sharp v. Lush*, 10 Ch. Div. 468; *Upton v. Brown*, 20 Ch. Div. 731.

either decide the matter, or (which he rarely does) refer same back to the Chief Clerk (or Master) with directions (liv. 3).

In the Chancery Division, the applicant at Chambers has a right to bring the matter of his application before the Judge personally, so that, in that Division, there is no appeal (properly so called), but an instant reference from the Chief Clerk to the Judge at Chambers; but in the Common Law Divisions, appeal from order or decision of Master lies to Judge by summons, *i.e.*, at Chambers, within four days; either the Master or the Judge will extend time for this appeal (liv. 4). An appeal or further appeal (as the case may be) lies from the Judge at Chambers to the court, on motion, within eight days (liv. 6), that is to say, orders (not being discretionary) made by any Judge at Chambers may be appealed or (as the case may be) further appealed by motion upon notice to the Judge in Court (in the Chancery Division) or to a Divisional Court (in the Common Law Division); and, thereafter, they become appealable to the Court of Appeal (Act 1873, § 50); and such orders may, by leave of the Judge, or of the Court of Appeal, be appealed direct from Chambers to the Court of Appeal (Act 1873, § 50; and see §§ 130-135, *infra*).

In the Chancery Division, the Court is in the habit of referring to Chambers the following matters:—

Generally, any matter (which in the Judge's opinion) can be more conveniently disposed of in Chambers (Master in Chancery Abolition Act, 1852, § 27), and particularly the prosecution of accounts and inquiries directed to be taken or made by any order in an action, and whether the same be the entire substance of the order, or only ancillary to working out the order; whether—



- (1.) In action for administration of estate, or for execution of the trusts of a deed; or,
- (2.) In actions of foreclosure or of redemption of mortgage; or,
- (3.) In actions for partition of real estate, or for sale in lieu thereof; and so forth.

And conversely the Judge may adjourn from Chambers into Court any matter which, in his opinion, would be better heard in Court (Master in Chancery Abolition Act, 1852, § 27).

[In the Common Law Divisions, the following matters were taken in Chambers,—before a Master: Generally (under the “Despatch of Business Act,” 30 & 31 Vict., c. 68), such matters as the Judge at Chambers might himself attend to, other than matters relating to the liberty of the subject; and particularly, such matters as were prescribed in the *Regula Generalis* of Michaelmas Term, 1867, other than and except (unless by consent) the matters therein excepted (*Day’s Common Law Procedure*, 4th ed. pp. 527, 528).]

§ 112. *Chambers.—Proceedings in.*—Wherever the rules of procedure express (and they do so *passim*) that any application may be made to the Court “or a Judge,” then if the application is made “to a Judge,” it may be made to him sitting at Chambers, and in that case it should be made by summons, supported in general with an affidavit or affidavits. The business transacted at Chambers by the Judge and his officers may be mapped out in the following manner:—

Any Judge of the High Court may (subject to any rules of court) exercise in Chambers all or any part of the jurisdiction by the Judicature Act vested in the High Court in respect of all such causes and matters, and in respect of all such proceedings in any causes and matters, as before the Judicature Act he might

have heard in Chambers, or as he is or may be directed or authorised by any rules of court to hear in Chambers (Act 1873, § 39).

Under this general heading would fall the following applications:—

- (1.) Generally, all matters which (without detriment to the public advantage) can be heard in Chambers (Master in Chancery Abolition Act, 1852, § 11; and Despatch of Business Act, 1867); and as (in Chancery) there is no distinction between the Judge and his Chief Clerk like to that which exists (at Common Law) between a Judge and a Master, but every applicant in Chambers has a right to see the Judge himself upon no matter how trivial or how important an occasion, it is unnecessary to distinguish in the Chancery Division between matters to be transacted at Chambers before a Chief Clerk and those to be transacted there before the Judge; but, on the contrary, every proceeding in Chambers may, in the first instance, be taken before the Chief Clerk, and thereupon, either immediately or ultimately (if necessary), be referred to the Judge.
- (2.) Particularly, the following applications:—
  - (a.) For extensions of time to plead, or to do any other act for which time is extendible.
  - (b.) For leave to amend the writ or pleadings.
  - (c.) For orders for production and inspection of documents, and for inspection of property.
  - (d.) For appointment of guardians *ad litem* in the case of infants and lunatics not so found, being defendants.
  - (e.) For leave to issue and to serve writ of summons out of jurisdiction.
  - (f.) For order to take ordinary account (xv. 2),

where writ is expressly indorsed (under iii. 8) with claim for account.

- (g). For final judgment where writ is specially indorsed with particulars of debt or liquidated demand (xiv. 1).

[But in the Common Law Divisions there exists a real distinction between the Master and the Judge at Chambers, and an appeal properly so called lies (within four days) from the Master to the Judge, besides an immediate or ultimate reference; and under the Judicature Acts, 1873-75, it is provided that the Master shall *not* have jurisdiction in the following particular matters; that is to say,—

- (1.) Matters relating to criminal proceedings or to the liberty of the subject;
- (2.) Removal of actions from one division or judge to another division or judge;
- (3.) The settlement of issues;
- (4.) Discovery by way of inspection of property (liv. 2 and 2*a*, November 1878);
- (5.) Appeals from District Registrars;
- (6.) Interpleader, where judgment is to be final and summary by consent, or when the matter being of less value than £50, the judgment is to be final and summary at the request of one of the parties (liv. 2*a*, November 1878);
- (7.) Prohibitions;
- (8.) Injunctions and other like interim orders;
- (9.) Awarding of costs;
- (10.) Reviewing taxation of costs; and
- (11.) Acknowledgments of married women.

*Nota Bene.*—By consent of the parties, the Master may settle issues (liv. 2), and may also grant discovery by way of inspection of property, and may exercise the summary final jurisdiction in interpleader (liv. 2*a*,

November 1878); and without any such consent, he undertakes ordinary practice matters in interpleader (liv. 2), and may make orders *nisi* charging stock or shares (liv. 2a, November 1878), and may grant discovery otherwise than by inspection of property (liv. 2a, November 1878).]

*N.B.*—Many of the above particularised matters may be also done (and more usually are done) in court, *i.e.*, upon motion, the Judicature Acts and Rules expressing in general that the application may be to the court or a judge, *i.e.*, in open court or at chambers, although occasionally they prescribe an application by summons only (xiv. 1, 2; xv. 1, 2); the court may, however, always check the improper use of motions instead of summonses by allowing only such costs of the motion as would have become payable if the proceeding had been taken by summons; but, *nota bene*, no foreclosure decree can be obtained on summons (c).

§ 113. *District Registries.—Modes of Proceeding in.*—Every application to a District Registry is to be by summons (xxxv. 5) with or without affidavits.

*District Registries.—References to and from, and Appeals from.*—The District Registrar may refer a matter to a judge (being a matter which he thinks proper for the judge), and the judge may either decide the matter, or refer same back to the District Registrar with directions (xxxv. 6),—every such reference to and by, being to and by the judge to whom the action is assigned (xxxv. 10). The court may also order any books or documents to be produced, or any accounts to be taken, or any inquiries to be made, in the District Registry or by the District Registrar. The result of

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(c) *Lloyd v. David Lloyd & Co.*, 26 W. R. 572; 6 Ch. Div. 339.

the accounts and inquiries is to be reported by the District Registrar to the judge, who may or may not act upon the report (Act 1873, § 66).

Appeal from order or decision of District Registrar is to judge, within four days,—even in cases of jurisdiction by consent (xxxv. 7); either the District Registrar or the judge will extend time for this appeal (xxxv. 7).

§ 114. *District Registries.—Proceedings in.*—As above expressed, a writ of summons may in all Chancery actions issue out of any District Registry (§ 6 *n.*, *supra*), and appearance thereto may also be entered in such registry (§ 17 *n.*, *supra*). And where from the appearance being there entered or otherwise, the action proceeds accordingly in the District Registry, and is not removed therefrom into the High Court (§ 115, *infra*), or by reason of some motion being made in the High Court the case is not thereby removed into the High Court (*d*), then the following proceedings (subject to the court or a judge otherwise ordering) may be taken in the District Registry, that is to say:—

All proceedings down to and including final judgment (where plaintiff entitled to enter same by consent or for default of appearance) (Act 1873, § 64), and down to and including order for account (where plaintiff entitled to enter same by consent or for default of appearance or of pleading), and including also (if the order for an account so direct) the taking of such account and reporting or certifying the result thereof (*e*), and down to and including interlocutory judgment (where plaintiff entitled to enter same for default of appearance (xiii. 6) or of pleading (xxix. 4, 5), together with final judgment thereon (when damages assessed), may

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(d) *Dyson v. Pickles*, W. N. 1879, p. 12.

(e) *In re Bowen, Bennett v. Bowen*, 20 Ch. Div. 538.

be taken in the District Registry,—subject always to the court otherwise ordering (xxxv. 1*a*); but wherever a judgment or order is not capable of being entered as aforesaid, but a trial or motion for same must first be had or made (*f*), then all proceedings down to and inclusive of entry for trial (xxxv. 1*b*, Dec. 1879, and xxxvi. 15*a*, Dec. 1879). And all pleadings and other documents requiring to be filed are to be filed in the District Registry (xix. 29). All orders made by the District Registrar, and requiring to be entered (including all judgments by consent or by default as aforesaid), are to be entered in the District Registry; but judgments and orders made by a judge are entered in London, and merely an office copy thereof is filed in the District Registry (xxxv. 2); also, in a Chancery action, all certificates of the Chief Clerk and Taxing Masters and all affidavits and other documents (required to be filed) used in London before the judge in Chambers or before any Taxing Master or Referee of the Court, and not already filed in the District Registry, are to be filed in the London office, and only office copies thereof are (if the judge directs) to be transmitted to the District Registry (xix. 29*a*, March 1879). Upon all judgments entered in the District Registry, costs may be taxed there also; and upon such judgment, and also upon all orders entered in the District Registry, execution may issue from the District Registry to enforce them (xxxv. 3), and when leave is necessary to the issue of such execution, such leave may be obtained in the District Registry (xxxv. 3*a*, April 1880); and executions may also be renewed in the District Registry (xxxv. 3*a*, April 1880). And for the purposes aforesaid, the District Registrar may exercise all the authorities of a judge at Chambers (xxxv. 4), including the making of garnishee orders,

and charging orders *nisi*, and the examination of judgment debtors for garnishee purposes (xxxv. 3a, April 1880), other than and except in respect of the following matters; that is to say:—

- (1.) Matters affecting the liberty of the subject;
- (2.) Transfer of actions from division to division or from judge to judge;
- (3.) Prohibitions;
- (4.) Injunctions, whether under Act 1873, § 25, sub-sect. 8; or under lii. 1, 2, 3.
- (5.) Awarding costs in proceedings not before himself;
- (6.) Reviewing taxation of costs;
- (7.) Charging orders *absolute*;
- (8.) Acknowledgments of married women; and,
- (9.) Leave for service of writs of summons or of notice in lieu thereof out of jurisdiction (xxxv. 4; and liv. 2 and 2a).

§ 115. *District Registries.—Removal from, into High Court.*—The District Registrar may refer to a judge of the High Court for his decision any matter arising in an action that is proceeding in the District Registry (xxxv. 6),—but this reference is scarcely a removal, as the matter comes back decided or with directions for its decision (xxxv. 6), and in the meantime the action has remained in the District Registry.

Removal, properly so called, from District Registry into High Court is authorised in the following cases:—

- (1.) The removal is of right on the part of a defendant where the writ is not specially indorsed (xxxv. 11), unless the defendant asking removal is merely formal (xii. 5; xxxv. 12).
- (2.) The removal is also of right on the part of a defendant (where writ or summons is specially indorsed under iii. 6) in either of the following cases:—

(a.) Where plaintiff within four days after appearance of defendant does not apply (under xiv. 1a) for an order to sign final judgment on affidavit of no defence (xxxv. 11); or,

(b.) Where plaintiff has so applied, but defendant has obtained leave (under xiv. 5) to defend (xxxv. 11).

(3.) The removal is in the discretion of the court in all other cases, on the application of either plaintiff or defendant; and apparently either the judge or the District Registrar may in this group of cases order the removal (xxxv. 13); but only the judge in the first and second groups, *supra* (Act 1873, § 65).

§ 116. *District Registries.—Removal into, from High Court.*—Any party to an action proceeding in London may obtain an order, but not as of right, from the court or judge to remove the action from the High Court (*i.e.*, from London Chambers) into the District Registry (xxxv. 13).

§ 117. *District Registrars.—Jurisdiction of Court over.*—The District Registrar is an officer of the Supreme Court (in its High Court as well as its Appeal Court divisions), and as such is subject to the control of the court (Act 1875, § 13; xxxv. 9).

#### SECTIONS 118–126.

MOTIONS AND SUMMONSES.—THE VARIOUS PROCEEDINGS BY, ALL BEING SUMMARY.

§ 118. *Motions.—The Various Occasions for, in an Action.*—All applications to a Divisional Court or to a Judge in Court are to be made by motion (liii. 1); and all appeals to the Court of Appeal are likewise to be made by motion, being called appeal-motions when



made in respect of any interlocutory order, and being called appeals simply when made in respect of any judgment, final or interlocutory (lviii. 2). All applications for a new trial are to be made by motion, and that *ex parte* in the first instance (xxxix. 1a), the motion being made to a Divisional Court where the trial has been before a judge and jury (g), and being made to the Court of Appeal where the trial has been before a judge without a jury (xxxix. 1, Dec. 1876). Judgment may also be obtained on motion; but this motion is properly called motion for judgment, at least in the general case.

But besides these greater occasions for moving the court, there are innumerable other occasions of a lesser but more constant character; that is to say:—

(1.) The interim preservation, detention, or custody of property (lii. 1, 3) (h);

(2.) The sale of goods, &c., of a perishable, &c., character (lii. 2);

(3.) The prevention by injunction of certain wrongful acts (Act 1873, § 25, sub-sect. 8), wherever “just and convenient” that an injunction should issue (i); and an injunction in the nature of a prohibition may also be had (j).

(4.) The appointment of a receiver of estates (Act 1873, § 25, sub-sect. 8) (k);

(5.) The dismissal of action for want of prosecution (xxix. 1; xxxvi. 4a); and,

(6.) The writ of attachment, application for (xliv. 2).

(g) *Davies v. Felix*, W. N. 1878, p. 210.

(h) *In re Holt*, 16 Ch. Div. 115.

(i) *Beddoes v. Beddoes*, 9 Ch. Div. 89; *Day v. Brownrigg*, 10 Ch. Div. 294; *Shaw v. Earl of Jersey*, 4 C. P. Div. 120; and distinguish *Crowle v. Russell*, 4 C. P. Div. 186.

(j) *Hedley v. Bates*, 13 Ch. Div. 498; *Aslatt v. Southampton Corporation*, 16 Ch. Div. 143.

(k) *Truman & Co. v. Redgrave*, 18 Ch. Div. 547.

A *prima facie* case being made out by the applicant for any of the first four of these orders, the motion may be made at any time, and (in general) either by the plaintiff or by the defendant (lii. 4, 5); and the motion may even be made after judgment in the action (l).

§ 119. *Motions.*—*When they may be ex parte.*—Every motion for a rule or order to show cause in any action may be made *ex parte*, i.e., without notice to the other side (xxxix. 1a); but a rule or order to show cause is not to be granted in any action unless it is expressly authorised by the new rules of procedure (liii. 2), that is to say, upon motion for a new trial (xxxix. 1a), or for an order of revivor (l. 4; § 39, *supra*); or unless the rule or order is made in some proceeding “other than an action” (i. 3), and that course would have been previously the right course to take (m). Also, plaintiff may move *ex parte* for an injunction or receiver, or both (lii. 4), although it is more usual in such cases to move upon notice; and no injunction should be granted on *ex parte* motion when there is a motion on notice pending (n). Also, upon an application for a charging order on stock or shares (xlvi. 1), the application is, in the first instance, *ex parte*, for an order to show cause only (1 & 2 Vict., c. 110, § 15); and so likewise upon an application for a garnishee order (xlv. 2). Also, where the motion should, in the ordinary case, be upon notice, a motion may be made *ex parte*, upon satisfying the court or judge that the delay which would arise from giving notice of motion would or might entail irreparable or serious mischief (xliii. 3). Also, a motion may be *ex parte* where, by the old practice, the rule or order would

(l) *Smith v. Cowell*, 6 Q. B. D. 75; *Salt v. Cooper*, 16 Ch. Div. 544.

(m) *Re Phillips v. Gill*, L. R. 1 Q. B. D. 78; *In re Landore Siemens Steel Co.*, 10 Ch. Div. 489.

(n) *Graham v. Campbell*, 7 Ch. D. 470.

have been *ex parte* absolute in the first instance (liii. 3), subject, nevertheless, to any express provision in the new rules of procedure to the contrary; *e.g.*, rule for attachment for non-payment of costs on Master's allocatur was formerly *ex parte* absolute in first instance (Chitty's Practice, p. 1717), but every attachment is now obtainable on notice only (xliv. 2) (o).

§ 120. *Motions.—Service of Notice of.*—Excepting in the cases specified in § 119, *supra*, in which motions may be made *ex parte*, *i.e.*, without notice, no motion is to be made without previous notice thereof to the other side (liii. 3) (p). The notice of motion is to name the day on which (or so soon thereafter as possible) it is intended to bring on the motion; and between the day so named and the service of the notice of motion two clear days must intervene (liii. 4), but the court may give special leave to serve the notice of motion for an earlier day (liii. 4), in which case the notice of motion is to mention that such special leave has been given. Where a defendant has been duly served with the writ of summons in any action and has appeared, the plaintiff's two days' notice of motion (or, with special leave, a shorter notice) may be served as a matter of course; and where such a defendant has *not* appeared, and the eight days for appearance have expired, the plaintiff may, without any special leave, serve the two days' notice of motion (or, with special leave, a shorter notice) upon such defendant (liii. 7), and that either by merely filing same (xix. 6) or by personally serving same (q). And by special leave (to be obtained *ex parte*) the plaintiff may serve any notice of motion (either the two days' notice or any shorter notice) along with the writ of summons, or at any time after service

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(o) *Jupp v. Cooper*, 5 C. P. Div. 26.

(p) *Delmar v. Freemantle*, 3 Exch. Div. 237.

(q) *Whitaker v. Thurston*, W. N. 1876, p. 232.

thereof, and before the time limited for the appearance of such defendant (liii. 8).

§ 121. *Motions.—Hearing of, and Evidence upon.*—The court may direct notice of the motion to be served upon some person or persons not already served therewith, and may for that purpose adjourn the hearing of the motion (liii. 5); or the court may (but rarely will) dismiss the motion summarily (liii. 5); and successive adjournments of the hearing may be (and, on various accounts, usually are) made (liii. 6).

The evidence on motion is taken by affidavit; and one of the commonest occasions for the adjournment of a motion is the desire of some or one of the parties to consider whether he may not be able to produce affidavits in answer to those upon which the motion professes to be made. The necessity (which occasionally arises) of cross-examination on the affidavits may also cause an adjournment of the hearing of the motion, it not being, in general, convenient to have such cross-examination taken in court.

§ 122. *Motions.—For Rule or Order to Show Cause.*—No rule or order to show cause in an action is to be granted except in cases in which that mode of procedure is *expressly* authorised by the rules (Judicature Acts, 1873–75, liii. 2). Consequently, a rule to show cause, upon a motion *ex parte* without notice, can be granted in the following cases only; that is to say:—

(1.) Upon an application for a new trial (xxxix. 1a), by motion to the Court of Appeal, where the trial has been by a judge without a jury (xxxix. 1, Dec. 1876); or by motion to a divisional court, where the trial has been by a judge with a jury (xxxix. 1, Dec. 1876), and that even in the case of a non-

suit (*r*), and even in the case of an action sent out of Chancery for trial by jury (*s*), and an application to the wrong court will be dismissed (*t*), but it is necessary to distinguish between an action sent for trial, and an issue or issues only sent for trial (*u*). The various grounds for a new trial are—*e.g.*, that the verdict is against the weight of the evidence (*v*), or that the damages are excessive or are illusory (*w*). Where the motion for a new trial is made to a divisional court (*i.e.*, in respect of a trial had before a judge and a jury), upon the ground that the judge has not submitted or left the issues to the jury, and directed the jury as to the law and evidence applicable to the case (Act 1875, § 22), the motion is made upon an exception (*i.e.*, objection) taken at the trial and entered upon or annexed to the record (if any), and where there is no record, then the ground of motion must be simply brought to the notice of the court (lvi. 13), by counsel upon the motion (with or without an affidavit of the objection or exception having been taken, or other means of showing same). And in either case, the motion being (in the first instance) *ex parte*, an order *nisi* can be made, to which afterwards, upon showing cause against a new trial, the other side can object in the usual way. See also § 83, *Judgment.—On Motion for New Trial*.

(2.) Upon an application in any proceeding "other than an action" (i. 3), if a motion for such a rule or order would have been the correct course previously to the Judicature Acts, *e.g.*, in the matter of an arbitration (*x*); also, *e.g.*, for transferring an action into

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(*r*) *Etty v. Wilson*, 3 Exch. Div. 359.

(*s*) *Hunt v. City of London Real Property Co.*, 3 Q. B. D. 19.

(*t*) *Yetts v. Foster*, 3 C. P. Div. 437; *Davies v. Feliz*, 4 Exch. Div. 32.

(*u*) *Jones v. Baxter*, 5 Exch. Div. 275; *Jenkins v. Morris*, 14 Ch. Div. 674.

(*v*) *Solomon v. Bitton*, 8 Q. B. D. 176.

(*w*) *Phillips v. L. & S. W. Railway Co.*, 5 Q. B. D. 78.

(*x*) *Re Phillips and Gill*, L. R. 1 Q. B. D. 78.

Chancery after a winding-up order has been made (y); and so also in the matter of solicitors to show cause why they should not be struck off the roll.

(3.) Upon an application for a charging order on stock and shares (xlv. 1) belonging beneficially to any judgment debtor (1 & 2 Vict., c. 110, § 15); and,

(4.) Upon an application for a garnishee order (xlv. 2).

§ 123. *Motions.—For particular Interlocutory Orders.*  
—An injunction (either mandatory or preventive) may be granted (or a receiver appointed), wherever just and convenient (z), by order at any stage in the action (Act 1873, § 25, sub-sect. 8), but it is not the practice of the court to grant a mandatory injunction before the trial; and a preventive injunction may be granted either before or at or after the hearing, wherever it is fit to grant same (a); and in such a case the fact of possession, or of claim of right, or any other (technical or substantial) ground of objection to the injunction carries no weight; but injunctions are, in these last-mentioned cases, invariably on terms (b), and are also usually until such and such a day or until further order (c); and in other cases injunctions may be granted either with or without terms (Act 1873, § 28, sub-sect. 8). An order for committal for contempt is also to be obtained on motion (d). The following particular interlocutory orders in the nature of injunctions (either mandatory or preventive), may also be made:—

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(y) *In Re Landore Siemens Steel Co.*, 10 Ch. Div. 489; *Everingham's Case*, W. N. 1880, p. 99; *In re Madras Co.*, 16 Ch. Div. 702.

(z) *Beddoes v. Beddoes*, 9 Ch. Div. 89; *Day v. Brownrigg*, 10 Ch. Div. 294.

(a) *Noakes v. Noakes*, 4 P. Div. 60.

(b) *Shaw v. Earl of Jersey*, 4 C. P. Div. 359.

(c) *Bolton v. London School Board*, 7 Ch. Div. 766; *In re Holt*, 16 Ch. Div. 115.

(d) *Plating Co. v. Farquharson*, 17 Ch. Div. 49.

(1.) An order for the preservation or interim custody of the subject-matter of litigation, when a *prima facie* case of liability upon a defendant is made out, but such defendant claims to be relieved from the liability either wholly or partially (lii. 1).

(2.) An order for the sale of goods, wares, or merchandise,—as being either,

(a.) Of a perishable nature; or

(b.) Likely to injure from keeping; or

(c.) Desirable for other reasons to be sold (lii. 2) (e).

(3.) An order for the preservation of property the subject-matter of the litigation generally (lii. 3) (f);

(4.) An order for the detention of such property (lii. 3);

(5.) An order for the inspection of such property (lii. 3); and,

(6.) An order for the restitution of property (other than land) to the applicant, when the applicant's title to the property is not disputed, but the person in possession of it claims a right of retention on the ground of lien or otherwise (lii. 6).

[*N.B.*—In this sixth case, money must be paid into court to answer the lien or other claim, before the order is made (lii. 6).]

The plaintiff may apply for the first of these particular interlocutory orders at any time after his right to such order appears on the pleadings (if any); and (if none) after his right to the order appears on any affidavits or otherwise (lii. 5).

As regards all other interlocutory orders, whether by way of injunction or otherwise, any party may apply

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(e) *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 275.

(f) *Cash v. Parker*, 12 Ch. Div. 293.

for the order; but if a defendant, he must first have appeared to the writ (lii. 4); and unless he is a plaintiff, he can only apply on notice, and the plaintiff himself should also (excepting in cases of emergency) apply on notice and not *ex parte* (lii. 4).

A person who is not a party to the action cannot move for an injunction (*g*). The injunction now operates as an order simply, and no writ of injunction need be issued (lii. 8, April 1880).

§ 124. *Motions.—Stay of Proceedings in lieu of Injunction.*—In lieu of obtaining an injunction from the Chancery Division to stay an action in a Common Law Division, the latter division will itself, in a proper case (*h*), direct a stay of proceedings in the action, upon the motion of any person (who would have had a right to the injunction), whether such person is or is not a party to the action in the Common Law Division (Act 1873, § 24, sub-sect. 5).\*

§ 125. *Motions.—To Dismiss Action for Want of Prosecution.*—An order (subject, always, to the discretion of the court) may be made to dismiss a plaintiff's action (summarily before trial) in the following cases and upon the following grounds:—

- (1.) For default (by plaintiff) in delivering a statement of claim, being bound to deliver one (xxix. 1) (*i*).
- (2.) For non-compliance by plaintiff with an order to answer interrogatories or to grant discovery or inspection of documents (xxxi. 20).
- (3.) For default (by plaintiff) for six weeks (or

(*g*) *Brocklebank v. E. L. Railway Co.*, 12 Ch. Div. 839.

(*h*) *Crowle v. Russell*, 4 C. P. Div. 186.

\* The Court of Bankruptcy may still issue an injunction staying proceedings in any other court; and the Chancery Division may, in matters of winding up, do the like (*In re Artistic Colour Co.*, 14 Ch. Div. 502).

(*i*) *Whistler v. Hancock*, 3 Q. B. D. 83.



extended time, if any) after the close of the pleadings in giving notice of trial (xxxvi. 4a); and,

(4.) For default (by plaintiff) to give security for costs when ordered to do so (j).

§ 126. *Summonses.*—*The Various Occasions for, in an Action.*—All proceedings in an action, when the same are taken in Chambers or in the District Registry, are to be taken by summons (liv. 1; xxxv. 5).

The acts and rules in general leave it optional (in terms, at least) to take all proceedings of a summary kind incidental to the action in either of two ways, that is to say, either by motion or upon summons,—the phrase “by the court or a judge,” which occurs in the acts and in the rules *passim*, expressing that option. Nevertheless,—and in a Chancery action, at all events,—all such summary incidental proceedings, regarding which the procedure by motion or by summons is optional as aforesaid, should be taken upon summons and not by motion (k), in the first instance, at least, seeing that in the Chancery Division it is the judge himself (either personally or by his agent, the Chief Clerk) that attends in Chambers, and a judge sitting in Chambers has all the authority of a judge sitting in court. But the parties must really exercise their own discretion in the matter,—*e.g.*, an order to make an affidavit of documents would never be applied for on *motion*, but only on summons; and, on the other hand, there are many matters incidental to an action in which not only is it more speedy, but it is simply proper and desirable to apply by motion, and it may even (from the gravity or intricacy of the matter) be occasionally necessary to apply by petition (2 Dan. Ch. Prac. 5th ed. p. 1434). *Semble*, a compromise arrived at in

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(j) *La Grange v. M'Andrew*, 4 Q. B. D. 210.

(k) *Evelyn v. Evelyn*, 13 Ch. Div. 138.

a pending action may be enforced therein by motion (*l*), but it is sometimes necessary to bring an independent action for the purpose (*m*).

It is somewhat different, of course, in the Common Law divisions, where the Master and the Judge are not (in substance) identical, and certain things are to be done by the Master, and certain others not (liv. 2 and 2*a*).

And as regards even Chancery actions, when these proceed in the District Registry, it is quite true that the District Registrar is like a Common Law Master much more than like a Chief Clerk; and it is even expressly provided that the District Registrar (although otherwise able to do whatever a Judge at Chambers can do) shall not exercise any authority or jurisdiction which a Common Law Master is precluded from exercising (xxxv. 4, and liv. 2 and 2*a*).

In two instances, the Acts or rules give no option between summons and motion, but prescribe a summons, viz. :—(1.) Applications for interlocutory order for an ordinary account where (under iii. 8) the writ is expressly indorsed with a claim for such account (xv. 2); and (2) Applications for final judgment where (under iii. 6) writ is specially indorsed in the case of a claim of debt or liquidated demand (xiv. 1, 2). Also, a compromise arrived at in an action may be enforced on summons (*n*), but apparently might also be enforced on motion.

So also a defendant, after appearing to the writ of summons, if he is in a position to avail himself of interpleader, should take out a summons (before delivering any statement of defence) to compel the plaintiff

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(*l*) *Scully v. Lord Macdonald*, 8 Ch. Div. 658; *Davis v. Davis*, 13 Ch. Div. 861.

(*m*) *Gilbert v. Endean*, 9 Ch. Div. 259.

(*n*) *Eden v. Naish*, 7 Ch. Div. 781.

and some third person to settle their respective claims between them, the defendant himself having no interest in the subject-matter of the litigation (i. 2). In this case, a motion to obtain an interpleader order would be a wholly mistaken course, unless, perhaps, on very exceptional grounds.

On the other hand, in a great many instances, the Acts or rules give no option between summons and motion but prescribe a motion, and, of course, in these cases [as to which see §§ 118-125, *Motions*], there is no power of proceeding by summons. Neither can a foreclosure decree be made on summons (o).

Besides the matters regarding which the Acts or the rules permit or prescribe a summons, there are many other matters (of a summary kind incidental to an action) that may be taken by summons, being in fact the proceedings which may be taken at Chambers (independently of the Acts and rules) as specified in § 112, *Chambers—Proceedings in*.

## SECTIONS 127-129.

### COSTS.—PROVISIONS REGARDING, *GENERAL* AND *PARTICULAR*.

§ 127. *Costs.—General Provisions regarding*.—In general the costs as between party and party follow the event of every action in the court, subject to a general discretion in the court (lv.), which will only be exercised on sufficient grounds (p), and subject also to the special provisions of the Judicature Acts, or to the agreement of the parties (q) regarding costs.

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(o) *Lloyd v. David Lloyd & Co.*, 26 W. R. 572.

(p) *Harris v. Petherick*, 4 Q. B. D. 611; *Collins v. Welch*, 5 C. P. Div. 27; *Harnett v. Vise*, 5 Exch. Div. 307; *Dicks v. Yates*, 18 Ch. Div. 76; *Willmott v. Barber*, 17 Ch. Div. 772.

(q) *Gallati v. Wakefield*, 4 Exch. Div. 249.

And this rule holds good even where there has been an order for a new trial, and on the new trial the judgment is the reverse of the former judgment (*r*); also, where the plaintiff recovers the most trivial sum, as the balance after deducting defendant's counter-claim (*s*). The rule extends to all the costs "of and incident to" the action (*t*); but does not include the costs of issues upon which the plaintiff is non-suited or unsuccessful (*u*); also, the costs of the action do not necessarily include the costs of the reference or inquiry as to damages (*v*). A divisional court has original jurisdiction to deprive (for proper cause) a successful plaintiff of his costs of the action, where no order regarding such costs is made at the trial (*w*).

Where costs are payable out of a particular estate or fund, or rateably out of real and personal estate (*x*), the same may (according to circumstances) be (and that either of right or by special order) payable either as between solicitor and client or as between party and party, but in representative cases the costs are only between party and party (*y*); and as regards costs so payable, the right (where it exists) of any trustee, mortgagee, or other person to his costs is not affected by the Judicature Acts (*lv.*) (*z*).

A successful appellant is entitled, in general, to the

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(*r*) *Field v. G. N. Railway Co.*, 3 Exch. Div. 261.

(*s*) *Potter v. Chambers*, 4 C. P. Div. 69 and 457; *Chatfield v. Sedgewick*, 4 C. P. Div. 383; *Neale v. Clarke*, 4 Exch. Div. 286; *Turner v. Hoyland*, 4 C. P. Div. 432; *Myers v. Defries*, 5 Exch. Div. 15, 180; *Stooke v. Taylor*, 5 Q. B. D. 569; *Baines v. Bromley*, 6 Q. B. D. 691.

(*t*) *In re Brandreth's Trade Mark*, 9 Ch. Div. 618.

(*u*) *Abbott v. Andrews*, 8 Q. B. D. 648; *Sparrow v. Hill*, 7 Q. B. D. 362; 8 Q. B. D. 479.

(*v*) *The Consett*, 5 P. Div. 77; *Slack v. Midland Railway Co.*, 16 Ch. Div. 81.

(*w*) *Myers v. Defries*, 4 Exch. Div. 176; *Siddons v. Lawrence*, 4 Q. B. D. 459.

(*x*) *In re Middleton, Thompson v. Harris*, 19 Ch. Div. 552.

(*y*) *Grimwade v. Mutual Society*, 18 Ch. Div. 530.

(*z*) *Smith v. Dale*, 18 Ch. Div. 516; *Ex parte Russell, in re Butterworth*, 19 Ch. Div. 588.

costs of the appeal, and also to the costs in the court below,—as well his own costs there as also the costs which he may have paid to the other side under the adverse judgment. But where the court is divided in opinion, each party may be left to bear his own costs (a).

§ 127a. *Costs.—Miscellaneous Provisions regarding.*  
—When a client employs an uncertificated solicitor, neither the solicitor nor the client can recover his costs, even when successful (b). The costs of three counsel may or may not be allowed (c); likewise the costs of shorthand writers' notes of evidence (d); and apparently a special direction of the court is required for their allowance (e); such direction to be obtained on delivery of judgment, and not afterwards (f); and similarly on a reference (g). The costs of an abandoned motion must be paid in full (h), including the costs of copies where necessary (i), unless under exceptional circumstances (j); but the costs of an application to the court for these costs will not be allowed in general, unless payment has been demanded and refused (k); so likewise the costs on a motion to commit for contempt (l). Refreshers to counsel (m),

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(a) *Anderson v. Morice*, 1 App. Ca. 713; *Pryce v. Monmouth, &c.*, Co., 4 App. Ca. 197; *Aitchison v. Lohre*, 4 App. Ca. 755.

(b) *Re Fowler v. Monmouth, &c., Co.*, 4 Q. B. D. 334.

(c) *Kirkwood v. Webster*, 9 Ch. Div. 239.

(d) *Bigsby v. Dickinson*, 4 Ch. Div. 24; *Kirkwood v. Webster*, 9 Ch. Div. 239; *Lee Conservancy Board v. Button*, 12 Ch. Div. 383; *Bewley v. Atkinson*, 13 Ch. Div. 283; *Watson v. G. W. Railway Co.*, 6 Q. B. Div. 163.

(e) *Ashworth v. Outram*, 9 Ch. Div. 483; *In re Duchess of Westminster Silver Lead Ore Co.*, 10 Ch. Div. 307.

(f) *Hill v. Metropolitan Asylum*, W. N. 1880, p. 98; *Earl De la Warr v. Miles*, 19 Ch. Div. 80.

(g) *Wells v. Mitcham Gaslight Co.*, 4 Exch. Div. 1.

(h) *Waddell v. Blockey*, 10 Ch. Div. 416.

(i) *Warner v. Mosses*, 19 Ch. Div. 72.

(j) *Norton v. L. & N. W. Ry. Co.*, 11 Ch. Div. 118; *Harrison v. Leutner*, 16 Ch. Div. 559.

(k) *Griffin v. Allen*, 10 Ch. Div. 913.

(l) *Steele v. Hutchings*, W. N. 1879, p. 18.

(m) *Harrison v. Wearing*, 11 Ch. Div. 206; *The Niera*, 5 P. Div. 118; *Brown v. Sewell*, 16 Ch. Div. 517.

and costs of experts (the experts not exceeding three), may be allowed (*n*). An action may be brought to trial for the sake of costs only (*o*); and upon a change of solicitors, no provision is made by the order as to costs (*p*). The payment of costs may be stayed pending appeal (*q*), but usually is not (*r*); also, the non-payment of costs ordered to be paid is not in general any ground for staying the action (*s*). Regarding costs when plaintiff succeeds in his action and defendant on his counter-claim, the rule is that the plaintiff gets the general costs of the action, and the defendant only the extra costs of the counter-claim, and *vice versa* (*t*); solicitor's retainer is joint and several (*u*); but where the plaintiff never authorised the solicitor to bring the action at all, he is liable to pay to the plaintiff all his costs as between solicitor and client, and also to pay to the defendant all his costs of the action (*v*). A plaintiff accepting money paid into court in discharge of his action, may sign judgment for his costs (*w*); contribution towards costs may be ordered between co-defendants (*x*), and one defendant may be ordered to pay costs to a co-defendant (*y*), and a third party may be ordered to pay costs to defendant (*z*).

### Security for costs (either in an action or on an

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- (*n*) *Stanger-Leathes v. Stanger-Leathes*, W. N. 1879, p. 86.  
 (*o*) *Storr v. Corporation of Maidstone*, W. N. 1878, p. 219.  
 (*p*) *Grant v. Holland*, 3 C. P. Div. 180.  
 (*q*) *Grant v. Banque, &c.*, 3 C. P. Div. 202; *Adair v. Young*, 11 Ch. Div. 136.  
 (*r*) *Merry v. Nickalls*, L. R. 8 Ch. App. 205.  
 (*s*) *Morton v. Palmer*, 9 Q. B. D. 89.  
 (*t*) *Staples v. Young*, 2 Exch. Div. 325; *Blake v. Appleyard*, 3 Exch. Div. 195; *Potter v. Chambers*, 4 Exch. Div. 69; *Saner v. Bilton*, 11 Ch. Div. 416; *Mason v. Brentini*, 15 Ch. Div. 287; and distinguish *Baines v. Bromley*, 6 Q. B. D. 197.  
 (*u*) *In re Allen, Davies v. Chatwood*, 11 Ch. Div. 244.  
 (*v*) *Newbiggin v. Armstrong*, 13 Ch. Div. 310; *Nurse v. Durnford*, 13 Ch. Div. 764; *In re Savage*, 15 Ch. Div. 557.  
 (*w*) *Greaves v. Fleming*, 4 Q. B. D. 226.  
 (*x*) *Dearsley v. Middleweek*, 18 Ch. Div. 236.  
 (*y*) *Rudow v. Great Britain Society*, 17 Ch. Div. 600.  
 (*z*) *Hornby v. Cardwell*, 8 Q. B. D. 329; and distinguish *Yorkshire Wagon Co. v. Newport Coal Co.*, 5 Q. B. Div. 268.

appeal) is in the discretion of the court, as to amount, as to time of giving, and in all other respects (Rule 7, Feb. 1876; lviii. 15); and this security may extend to *past* as well as to future costs (*a*). The application for security should first be made to the party out of court (*b*). Appeals for costs alone do not lie (Act 1873, § 49), unless upon some question of principle or absolute right in the party (*c*); but appeals in respect of costs, charges, and expenses do lie (*d*); also, an appeal lies regarding any order of the court requiring or not requiring security for costs (*e*).

The usual grounds upon which security for costs has been ordered are that the plaintiff's appeal is vexatious or such like (*f*), or that his poverty is extreme (*g*), or that he is a liquidating debtor (*h*), or that he is insolvent (*i*), or that he has not paid the costs in the court below (*j*), or that the plaintiff is merely formal (*k*), or is out of the jurisdiction (General Procedure) (*l*).

Security for costs, if desired, must be applied for without delay (*m*), but may be applied for at any time (*n*), and must be given within a reasonable time (*o*).

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(*a*) *Massey v. Allen*, 12 Ch. Div. 807; *Chatfield v. Sedgewick*, 4 C. P. Div. 459.

(*b*) *Ship "Constantia"*, W. N. 1879, p. 124.

(*c*) *Johnston v. Cox*, 19 Ch. Div. 17; *Dicks v. Yates*, 18 Ch. Div. 76.

(*d*) *In re Chennell*, *Jones v. Chennell*, 8 Ch. Div. 492; *Farrow v. Austin*, 18 Ch. Div. 58; *Turner v. Hancock*, 20 Ch. Div. 303.

(*e*) *Northampton, &c., Co. v. Midland Wagon Co.*, 26 W. R. 485.

(*f*) *Ex parte Ward*, *in re Ward*, 20 Ch. Div. 356.

(*g*) *Harlock v. Ashberry*, 19 Ch. Div. 94.

(*h*) *In re Carta Para Mining Co.*, 19 Ch. Div. 457.

(*i*) *In re Ivory*, 10 Ch. Div. 372.

(*j*) *Usil v. Brearley*, 3 C. P. Div. 206; *Winterfield v. Bradnum*, 3 Q. B. D. 324; *Hankin v. Turner*, 10 Ch. Div. 372; *Clarke v. Roche*, 25 W. R. 309.

(*k*) *Belmont v. Aylward*, 4 C. P. Div. 352.

(*l*) *Mapleson v. Masini*, 5 Q. B. D. 144.

(*m*) *In re Musical Compositions, &c., ex parte Hutchins v. Romer*, W. N. 1879, p. 99. (*n*) *Martano v. Mann*, 14 Ch. Div. 419.

(*o*) *Polini v. Gray*, 11 Ch. Div. 741.

§ 128. *Costs.—Particular Provisions regarding.*—There are various grounds for making a special order as to costs, and such grounds may be conveniently classified as under :—

I. Independently of the Judicature Acts and rules, *i.e.*, by certain rules of equity (and of law) not depending on statute, and not affected by any particular statute or by the Judicature Acts,—

When a party succeeds at the trial or hearing (or upon motion for judgment), but upon evidence which is not strictly consistent with his pleadings (*p*), so that these want amendment at the trial, the court gives him no costs, and sometimes even requires him to pay the extra costs attributable to his faulty pleadings or general faulty conduct of the case (*q*); also, costs manifestly thrown away will not be allowed (*r*).

Also, in certain cases, *e.g.*, actions for foreclosure or redemption, the costs of the action are added to the principal sum due on the security, as a matter of course, whether the mortgagee is plaintiff or is defendant.

Also, in administration actions, and in actions for the execution of the trusts of a deed, a trustee or executor's costs are paid as between solicitor and client, and out of the estate (*s*), and in preference (usually) to any other costs coming thereout; yet he may be deprived of his costs, and even ordered to pay costs (*t*).

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(*p*) *Ex parte Cooper, In re Baum*, 10 Ch. Div. 313.

(*q*) *Evans v. Davis*, 10 Ch. Div. 747; *Child v. Stenning*, 11 Ch. Div. 82.

(*r*) *In re Jones*, 14 Ch. Div. 285; *In re General Financial Bank*, 20 Ch. Div. 276.

(*s*) *Moore v. Dixon*, 15 Ch. Div. 566; *Farrow v. Austin*, 18 Ch. Div. 58.

(*t*) *Hamer v. Giles*, 11 Ch. Div. 942; *Fane v. Fane*, 13 Ch. Div. 228; *Potter v. Jackson*, 13 Ch. Div. 845; *Williamson v. Corfield*, 6 P. Div. 27.



II. Under the provisions of particular statutes not affected (or else affirmed) by the Judicature Acts.—Various special provisions regarding costs are contained in particular statutes, *e.g.*, in the County Courts Act, 1867 (§§ 5, 7, 8, 10), and these provisions, *semble*, have been affirmed and continued by the Judicature Acts (Act 1873, § 67) (*u*). These last-mentioned provisions are briefly to the following effect:—

(1.) As to actions in the High Court, which lay in the County Court, no costs when £20 or under recovered on contract, or £10 or under recovered in tort, unless certificate for costs annexed to record, or judge in chambers allows costs (§ 5).

(2.) As to actions removed from the High Court into the County Court, costs prior to removal upon the High Court scale, and subsequent to the removal upon the County Court scale (§ 7),—applicable to actions on contract only, where amount claimed is or is reduced to £50 or under; but the like taxation of costs where action for malicious prosecution, &c., removed into the County Court (§ 10).

*Nota Bene.*—Detinue is (for this purpose) tort (*v*).

III. Under the express provisions of the Judicature Acts and Rules alone,—

(1.) Needless prolixity or divergence from the prescribed forms in writs of summons (*ii*. 2), in pleadings (*xix*. 2), is visited with costs.

(2.) Mis-joinder or non-joinder of parties (*xvi*. 1),

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(*u*) *In re Copt*, 6 Q. B. D. 607; *Ferguson v. Davison*, 8 Q. B. D. 470; and see *Tenant v. Ellis*, 6 Q. B. D. 46; *Ex parte Hospital of St. Katherine*, 17 Ch. Div. 378; *Hartmont v. Foster*, 8 Q. B. D. 82; and distinguish *Garnett v. Bradley*, 3 App. Ca. 944; *Ex parte Mercers' Co.*, 10 Ch. Div. 481; and *Parsons v. Tinsling*, 2 C. P. Div. 119.

(*v*) *Bryant v. Hubert*, 3 C. P. Div. 389; and see *Pontifex v. Midland Ry. Co.*, 3 Q. B. D. 23; *Fleming v. M. S. & L. Ry. Co.*, 4 Q. B. Div. 81.

and improper joinder of actions (xvii. 9), are also visited with costs.

(3.) An unnecessary statement of claim (xxi. 1c), or a foolishly hostile statement of defence (xxii. 4), or a frivolous demurrer (xxviii. 2), may be visited with costs.

(4.) Amendments (at unseasonable times or in unreasonable and inconsistent ways) are visited with costs (xxvii. 4, 6; xxviii. 7) (*w*).

(5.) Demurrers, when overruled, obliged the demurring party to pay costs, unless the court should otherwise direct (xxviii. 11); and demurrers, whether to the whole or to part of the action, where they are allowed, oblige the party whose pleading is demurred to, to pay costs, unless the court should otherwise direct (xxviii. 6, 8, 9).

(6.) Want of prosecution, where action is dismissed for, obliges the plaintiff to pay costs (xxix. 1, 2).

(7.) Interrogatories of an unreasonable, vexatious, or unduly lengthy character are visited with costs (xxxi. 2).

(8.) Admissions of documents, unreasonable refusal to make, lays the party refusing open to the probability of having the costs of the proofs thereof to pay, even though he should be successful (xxxii. 2).

(9.) Affidavits which unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, and, *à fortiori*, scandalous matter (*x*), may have to be paid for by the party filing same (xxxvii. 3).

(10.) Judgment of non-suit may (in a proper case) be set aside, but usually upon payment of costs (xli. 6).

(11.) Execution, leave to issue, where such leave necessary, will (if granted) be granted usually upon payment of the costs (xlii. 19).

(12.) Attachment of debts, the costs of, are entirely

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(*w*) *Blackmore v. Edwards*, W. N. 1879, p. 175.

(*x*) *Cracknall v. Janson*, 11 Ch. Div. 1.

in the discretion of the court (xlv. 10); also attachment of person, costs of (lv. 1) (y).

(13.) Appeals, cross notice of, when not given, is a ground slightly influencing the court in awarding costs of the appeal (lviii. 6) (z).

(14.) And, *nota bene*, all the particular statutes confining the costs recoverable in actions of libel and slander to the amount of the damages recovered have been repealed by the Judicature Acts (a); and that even in the case of inferior courts (b); but the court may at the trial, or even subsequently thereto (c), entertain an application to deprive the plaintiff of his costs. And this repeal appears to be general (d).

§ 129. *Costs.—Taxation of.*—Various special rules (and orders) regarding taxation of costs have been issued from time to time (lxa. 3, Dec. 1879) under the Judicature Acts, especially the rules of August 1875, relating to, among other things, special allowances, *e.g.*, regarding scientific witnesses (e), and regarding counsel's fees for attending at chambers (f); the order as to court fees, October 1875 (g); the order as to taking fees by stamps, October 1875; the order as to fees and percentages, April 1876; the order as to fees of official referees, April 1877; and the order as to fees in Manchester and Liverpool District Registries, October 1877. Such taxation may be on either the higher or the lower scale (h); and may be even after payment, but only under special circumstances (i).

(y) *Abud v. Riches*, L. R. 2 Ch. Div. 528.

(z) *Ralph v. Carrick*, 11 Ch. Div. 873.

(a) *Garnett v. Bradley*, 3 App. Ca. 944.

(b) *King v. Hawkesworth*, 4 Q. B. D. 371.

(c) *Bowey v. Bell*, 4 Q. B. D. 95.

(d) *Ex parte Mercers' Company*, 10 Ch. Div. 482.

(e) *Mackley v. Chillingworth*, L. R. 2 C. P. Div. 273; *Turnbull v. Janson*, 3 C. P. Div. 264.

(f) *In re Chapman*, 9 Q. B. D. 294.

(g) *Armitage v. Elworthy*, 13 Ch. Div. 91.

(h) *In re Sanderson*, 7 Ch. Div. 176; *Rogers v. Jones*, 7 Ch. Div. 345.

(i) *In re Heritage*, 3 Q. B. D. 726; *Watson v. Rodwell*, 11 Ch. Div. 150.

Costs may be set off against costs (*j*); and the taxing-masters exercise a very large discretion (*k*).

### SECTIONS 130—135.

#### APPEALS.—THE PROCEEDINGS UPON, AS WELL *FORMAL* *AS SUMMARY.*

§ 130. *Appeals.—Varieties of.*—Every judgment (whether final or interlocutory), and also every order, is appealable to the Court of Appeal (Act 1873, § 19), unless where the Judicature Acts or any other Acts exclude the right of appeal, or declare the judgment or order to be final or without appeal (Appellate Jurisdiction Act, 1876, s. 20); and every judgment (whether final or interlocutory), and also every order of the Court of Appeal, is appealable to the House of Lords (Appellate Jurisdiction Act, 1876, s. 3), but as regards Scotland and Ireland, only where error or appeal lay before the Appellate Jurisdiction Act, 1876. And there are two exceptions to appealable judgments or orders, viz.—(1.) Orders made by consent, and (2.) Orders as to costs merely, where the costs are matter of discretion (Act 1873, § 49), and generally all matters of *procedure* which are discretionary (*l*). These two exceptions are, however, appealable with the leave of the ordering judge (Act 1873, § 49).—The judgment of a Divisional Court of the High Court, con-

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(*j*) *Barker v. Hemming*, 5 Q. B. D. 609; *Phillips v. Phillips*, 5 Q. B. D. 60.

(*k*) *Simmons v. Storer*, 14 Ch. Div. 154; *Ex parte Ditton, in re Woods*, 13 Ch. Div. 318; *Smith v. Day*, 16 Ch. Div. 726; and see *Edison Telephone Co. v. India Rubber Co.*, 17 Ch. Div. 137 (as to costs in patent cases where action discontinued after particulars of objection delivered); *Robertson v. Robertson*, 6 P. D. 119, and *Smith v. Smith*, 7 P. D. 84 (as to husband's liability for guilty wife's full costs of divorce); *Taylor v. Taylor*, 6 P. D. 29; *Metropolitan District Railway v. Sharpe*, 5 App. Ca. 425.

(*l*) *Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 664; and see *Jarmain v. Chatterton*, 20 Ch. Div. 493, explaining (as to court's discretion in committing for contempt) *Ashworth v. Outram*, 5 Ch. Div. 943.

sisting of not fewer than five judges, and acting as a court for Crown Cases Reserved (11 & 12 Vict. c. 78), is not further appealable (Act 1873, § 47) (*m*). Nor is any appeal allowed in a criminal cause or matter [not being to the last-mentioned Divisional Court upon a point reserved], excepting for some error of law apparent upon the record (Act 1873, § 47). Rehearings are abolished (*n*).

Appeals from Inferior Courts (including County Courts) are to a Divisional Court of the High Court (Act 1873, § 45), and not further unless by leave of the Appeal Divisional Court (Act 1873, § 45) (*o*).

Orders (not being discretionary) made by the Judge in Chambers, having been first moved upon notice, to be set aside or discharged by the Judge in Court (in the Chancery Division) (*p*), or by a Divisional Court (in the Common Law Divisions), become thereafter appealable to the Court of Appeal (Act 1873, § 50); and such orders may, by leave of the judge or of the Court of Appeal, be appealed direct from Chambers to the Court of Appeal (Act 1873, § 50). In such cases, either the judge should grant leave, or should certify that he does not want any further argument, or the Court of Appeal should be applied to in order to set down the appeal without the judge's certificate (*q*).

A judgment of the Lord Mayor's Court is not appealable direct to the Court of Appeal, but is appealable in the first instance to the Divisional Court (*r*).

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(*m*) *The Queen v. Whitchurch*, 7 Q. B. D. 534; and see *Mellor v. Denham*, 5 Q. B. D. 467.

(*n*) *In re St. Nazaire Land Co.*, 12 Ch. Div. 88.

(*o*) *The Queen v. Savin*, 6 Q. B. D. 309.

(*p*) *Holloway v. Cheston*, 19 Ch. Div. 516.

(*q*) *Thomas v. Elsom*, L. R. 6 Ch. Div. 346.

(*r*) *Appleford v. Judkins*, 3 C. P. Div. 489, overruling *Le Blanch v. Reuter's Telegraph Co.*, 1 Exch. Div. 408.

§ 131. *Appeal to Divisional Court of High Court.*—  
These appeals, when from County Courts, are,—

Either (1.) Upon a special case, settled and signed in the County Court by the parties or by the County Court judge, and sealed with the seal of the County Court (see 13 & 14 Vict., c. 61, as to such special cases in common law matters; and 28 & 29 Vict., c. 99, as to such special cases in equity matters).

[*N.B.*—No evidence is rightly adducible,—the appeal being grounded upon a mere point of law or upon some question of the rejection or mis-reception of evidence.]

[*N.B.*—Four days before the day appointed for argument of the special case, lodge two copies of the case at the Crown Office of the Queen's Bench Division, and they will be forwarded to the Divisional Court by the day (Notice, Feb. 1877).]

Or (2.) By motion (38 & 39 Vict., c. 50, § 6) (*s*).

[*N.B.*—No such motion can be made unless a copy of County Court judge's notes (*t*), signed by the judge, is handed to the proper officer in court (Notice, Feb. 1877); and the points intended to be taken on the appeal must have been taken and defined before the County Court judge, and that at the time of the trial or hearing there, so as to be embodied in his notes] (*u*).

[*N.B.*—The time for appealing by motion under 38 & 39 Vict., c. 50, § 6, is eight days, not extendible (*v*); and for appealing by special case under 13 & 14

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(*s*) *Rhodes v. Liverpool Commercial Investment Co.*, 4 C. P. Div. 425.

(*t*) *Morgan v. Rees*, 6 Q. B. D. 508.

(*u*) *Pierpoint v. Cartwright*, 5 C. P. Div. 138; *Seymour v. Coulson*, 5 Q. B. D. 359; *Morgan v. Rees*, 6 Q. B. D. 89.

(*v*) *Tenant v. Rawlings*, 4 C. P. Div. 134.

Vict., c. 61, is ten days, and under 28 & 29 Vict., c. 99, is thirty days.]

*N.B.*—When no Divisional Court is sitting, these appeals may be made to a judge at chambers (*w*).

§ 132. *Appeal to the Court of Appeal.*—(1.) *Manner of Appealing.*—By simple notice of motion (lviii. 2), stating whether the appeal is from the whole or from some (and what ?) part only of the judgment or order.

(2.) *Notice of Appeal.*—*Service of.*—The notice is to be served on all parties directly affected by the appeal, but not (at least, unless so ordered by the Court of Appeal) upon persons not so affected thereby (lviii. 3). The Court of Appeal may, in addition, direct service of the notice upon third persons not already parties (lviii. 3). Also, a person interested in but not a party to an action, may obtain on *ex parte* motion leave to appeal (*x*). Where an appeal-notice has been withdrawn, leave may be obtained to give a fresh appeal-notice (*y*). One of several co-plaintiffs may appeal (*z*).

(3.) *Cross Appeal.*—*Notice.*—It is not necessary to give notice of motion by way of cross appeal, but if the respondent intends to ask upon the hearing of the appeal any variation in the decision appealed against, then he should notify that intention to the parties who will be affected by such variation if made (lviii. 6); but even such notification is not necessary, although (having regard to costs) it may occasionally (*a*) be expedient (lviii. 6); and in an exceptional case a

(*w*) *Button v. Woolwich Building Society*, 5 Q. B. D. 88.

(*x*) *In re Markham*, 16 Ch. Div. 1; and see *Watson v. Cave*, 17 Ch. Div. 19.

(*y*) *Watson v. Cave*, 17 Ch. Div. 23.

(*z*) *Beckett v. Attwood*, 18 Ch. Div. 54.

(*a*) *The Lauretta*, 4 F. Div. 25.

substantive appeal-notice and not a mere cross appeal-notice, may be necessary (*b*).

(4.) *Notice of Appeal.—Amendment of.*—By leave of the Court of Appeal, and at any time (lviii. 3).

(5.) *Notice of Appeal.—Length of.*—From judgments (whether final or interlocutory), it is a fourteen days' notice, and from interlocutory orders, it is a four days' notice (lviii. 4). And as regards notice in lieu of notice by way of cross appeal from judgment (being final), it is an eight days' notice, and from interlocutory orders, it is a two days' notice (lviii. 7).

(6.) *Appeal.—Time for.*—From the refusal of an *ex parte* application,—four days from the refusal (lviii. 10).

From the refusal of an interlocutory application *on notice*,—twenty-one days from date of refusal (lviii. 15) (*c*); with an extension (very seldom granted) of the time on the ground of mistake (*d*).

From the refusal of a judgment (final or interlocutory), one year from date of refusal (lviii. 15).

[This would include dismissal of action.]

From an interlocutory order, *e.g.*, an order in an administration action (*e*), twenty-one days from the signing and entering or otherwise perfecting of the order (lviii. 15).

(*b*) *In re Cavander's Trusts*, 16 Ch. Div. 270; and see *Harrison v. Cornwall Mineral Railway Co.*, 18 Ch. Div. 334.

(*c*) *Dickson v. Harrison*, 11 Ch. Div. 243; and see *Berdan v. Birmingham Small Arms*, 7 Ch. Div. 34; *International, &c., Co. v. Moscow, &c., Co.*, 7 Ch. Div. 241.

(*d*) *MacAndrew v. Barker*, 7 Ch. Div. 701; *Rhodes v. Jenkins*, 7 Ch. Div. 711; and *Craig v. Phillips*, 7 Ch. Div. 249; *In re Mitchell's Trusts*, 9 Ch. Div. 5; *Pheysey v. Pheysey*, 12 Ch. Div. 305; *In re Blyth v. Young*, 13 Ch. Div. 416; *Collins v. Paddington (Vestry)*, 5 Q. B. D. 368.

(*e*) *Pheysey v. Pheysey*, 12 Ch. Div. 305.



*Nota Bene.*—This rule applies to a judge's finding without a jury, of what is in fact a verdict, as distinct from the judgment given upon it (*f*); also, to an order to sign judgment (*g*).

From a judgment (final or interlocutory), one year from the signing and entering or otherwise perfecting of the judgment (lviii. 15).

[*N.B.*—Appeals from any order or decision,—

- (a.) In winding up of companies,
  - (b.) In bankruptcy of individuals (*h*),
  - (c.) In proceedings other than actions,—
- are limited to twenty-one days.]

And the twenty-one days are to be reckoned,—

- (a.) From the refusal of the order or decision, if refused; and,
- (b.) From the signing and entering or otherwise perfecting of the order or decision, if made (lviii. 9) (*i*).

The time is occasionally extended, where the order, although interlocutory in form, is final in its effect (*j*).

(7.) *Setting down Appeal.*—The appeal must be set down within the time named in the notice of appeal (*k*). An appeal is set down,—

- (a.) If from refusal of judgment or order, by leaving notice of appeal simply; and,

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(*f*) *Krell v. Burrell*, 10 Ch. Div. 420; *Lowe v. Lowe*, 10 Ch. Div. 432; *Dollman v. Jones*, 12 Ch. Div. 553.

(*g*) *Standard Discount Co. v. Otard de la Grange*, 3 C. P. Div. 67.

(*h*) *Ex parte Garrard*, 5 Ch. Div. 61; *Ex parte Cochrane*, 9 Ch. Div. 698; *Ex parte Wigg*, W. N. 1879, p. 10; and distinguish *Ex parte Hall*, in *re Alven*, 16 Ch. Div. 501.

(*i*) *Ex parte Whitton*, in *re Greaves*, 13 Ch. Div. 881.

(*j*) *In re Leonard Jaques*, 18 Ch. Div. 392.

(*k*) *Re National Funds Assurance Co.*, L. R. 4 Ch. Div. 305; *Donovan v. Brown*, 4 Exch. Div. 148; distinguish *Goodbarne v. Fothergill*, 10 Ch. Div. 613.

- (b.) If from judgment or order, by leaving same or office copy thereof, and also notice of appeal, with the Registrar (lviii. 8).

(8.) *The Judgment.*—Upon the hearing of an appeal, the court has power (after amending and receiving further evidence, if either should be necessary) to give any judgment and to make any order which ought to have been made, and also to make such further or other order as the case may require (lviii. 5); and the court may in so doing either go beyond or stay within the notice of appeal, and may even give such judgment or make such order in favour of all or any of the respondents, although they may not have given any cross appeal notice (lviii. 5). And the court is not to be prevented from so doing by an interlocutory order or rule from which there has been no appeal (lviii. 14). Further, if upon the hearing of an appeal from a judgment pronounced by a judge in court on the verdict or finding of a jury, or of a judge without a jury, it appears to the Court of Appeal that a new trial ought to be had, the court may direct a new trial (lviii. 5a, March 1879).

(9.) *The Costs of Appeal.*—The court may either as to the whole or as to any part of these costs make such order as is just (lviii. 5). The appellant has almost invariably to pay the costs of an abandoned appeal (l).

(10.) *The Execution.*—This is left to the High Court and to the division and judge thereof from whom the appeal was brought. Where the judgment or order of the Court of Appeal is given or made by virtue of any original jurisdiction of that court, and not by virtue of its appellate jurisdiction, then, *semble*, the Court of Appeal (being the member of the Supreme Court) might grant execution, if the High Court should (in any such case) be unable to do so. But, *nota bene*, that the Court of Appeal has no original jurisdiction

otherwise than as incidental to its appellate jurisdiction. Execution (where necessary) for the costs of the appeal likewise issues from the High Court.

§ 133. *Appeal to House of Lords.*—(1.) *What Judgments and Orders Appealable.*—Any order or judgment of the Court of Appeal is appealable to the House of Lords, but (as regards Scotland and Ireland) only where error or appeal would lie to the House before the 1st November 1876 (Appellate Jurisdiction Act, 1876, §§ 3, 12). The *fiat* or consent of the Attorney-General remains necessary where it was necessary heretofore (Act 1876, § 10).

(2.) *Manner of Appealing.*—By petition (and not, as in the Court of Appeal, by motion), praying for a reviewal of the matter of the order or judgment appealed against (Act 1876, § 4); and no other manner of appealing to the House is permitted (Act 1876, § 11). The petition is to be signed by the appellant's two counsel (S. O., ii.), and is to be also certified by them to be a proper case for appeal (S. O., ii.)

(3.) *Time for Appealing.*—One year from the date of the order or judgment appealed from (S. O., i.); or one year after coming of age, or after discoveriture, or after becoming again *compos mentis*, or after getting out of prison, or (so only five years in all be not exceeded) one year after returning from abroad (S. O., i.)

(4.) *The Securities for Costs.*—One recognisance by self or substitute in the sum of £500, and either one joint and several bond of two sufficient sureties in the sum of £200, or else the deposit of £200 in the Court of Parliament (S. O., iv.)

(5.) *The "Form of Appeal."*—Consists of the petition of appeal with schedule thereto, accompanied with the certificate of counsel and a certificate that a copy of the appeal, together with a notice that the appeal was going to be presented on the day specified in the notice, has been served on the respondents.

(6.) *The Appeal.—Presentation of.*—The “form of appeal” printed on parchment is to be lodged in the Parliament office for presentation, and an order will be thereafter made ordering the respondents to lodge their cases in answer. The order, with an indorsement thereon of due service thereof, is to be afterwards returned into the Parliament office within six weeks after the date of the presentation of the appeal (S. O., ii. v.)

(7.) *The Appearance of the Respondents.*—Any respondents intending to support the judgment or order appealed from are to enter their appearances in the Appearance Book kept in the Parliament office (S. O., ii.)

(8.) *Lodging Printed Cases and Appendices.*—Six weeks (in English appeals) and eight weeks (in Scotch and Irish appeals) from the presentation of the appeal are allowed for the appellants and respondents respectively lodging these (S. O., ii.); the parties may agree upon a joint case with reasons *pro* and *contra*; the appendix is a print of all such parts of the evidence already used (including documents) as the appellant means to rely upon; and the respondent may add thereto additional documents also printed. The appellant delivers ten copies of appendix to the respondents, and lodges forty copies of his case and appendices in the Parliament office, and the respondent subsequently lodges ten more (S. O., ii.) If the respective periods of six weeks and eight weeks expire during the recess, these periods are extended to the third sitting day of the next ensuing meeting (S. O., vii.) And the periods may also otherwise be extended on petition.

(9.) *Setting down the Case.*—So soon as the printed cases (or case) and appendices have been lodged, either the appellants or the respondents may set the appeal down for hearing,—the appellant doing so at latest on the first sitting day after the expiration of the six weeks aforesaid (in English appeals), and of the eight weeks aforesaid (in Scotch and Irish appeals); and if he fail

to do so, either the respondent may set down the appeal on such first sitting day at latest, or the appeal will be dismissed (S. O., ii. v.) As to all (if any) of the respondents who have not entered an appearance, the appeal is set down *ex parte* upon proof of the service of the order aforesaid to appear.

(10.) *Cross-Appeals*.—May be presented, and set down in like manner as, but within the times limited for, appeals (S. O., vi.)

(11.) *Supplemental Cases*.—Are to be lodged upon the death of any party, if the appeal is revived against the representatives of such party (S. O., viii.); and so likewise where any party is added (S. O., viii.)

(12.) *Judgment*.—Upon hearing the appeal petition, the House is “to determine what of right and according to the law and custom of this realm ought to be done in the subject-matter of such appeal” (Act 1876, § 4).

(13.) *Costs*.—*Taxation and Recovery of*.—Where costs are given, the House may itself fix the amount, or its taxing officer will tax same, or the Clerk of the Parliaments will appoint some person to tax same, and will give a certificate of the taxed costs; and upon the order giving costs, with or without such certificate (as the case may require), the taxed costs are recoverable (S. O., x.)

(14.) *Execution*.—Where an appeal is allowed, the case is remitted to the court below (*i.e.*, to the High Court) with such (if any) direction as may be necessary, and the judgment or order of the House would accordingly (at least, in the general case) be executed in the High Court (*m*). Execution (when necessary) for the *costs* of the appeal is by order of the House estreating the recognisance (*n*).

§ 134. *The Evidence*.—*On Appeals*.—Firstly, when appeal is to the Court of Appeal,—

(*m*) *British Dynamite Co. v. Krebs*, 11 Ch. Div. 448.

(*n*) *Callaghan v. Callaghan*, 8 Cl. & Fin. 709; and see *Morgan & Davey's Costs* by Morgan & Wurtzburg, 2nd ed. pp. 543-547.

(a.) Evidence *already given* in the High Court is brought before the Court of Appeal, in general, as follows:—

- (aa.) Affidavit evidence,—by printed copies of affidavits already printed, and by office copies of affidavits not already printed;
- (bb.) Evidence taken *viva voce*,—by copy of judge's notes, or by such other means (usually shorthand writer's notes) as the court thinks expedient.

*N.B.*—Shorthand writer's notes are usually (but not necessarily) printed; and the cost of so taking and also of so printing them may, in a proper case, be allowed (lviii. 12) (o); but a special direction is necessary (p).

(b.) *Further* evidence, i.e., evidence additional to that already given in the High Court, may be brought before the Court of Appeal, in general, as follows:—

- (aa.) Upon interlocutory orders appealed from,—further evidence (of facts arisen either before or since the order appealed from) by affidavit or by *viva voce* examination in the Court of Appeal, or by deposition taken before an examiner or commissioner (lviii. 5);
- (bb.) Upon judgments (final or interlocutory) appealed from,—further evidence (of facts arisen *before* the decision appealed from, with leave (q), and of facts arisen *since* the decision appealed from, without leave) by affidavit or by *viva voce* examination in the Court of Appeal, or by

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(o) *Bigsby v. Dickinson*, L. R. 4 Ch. Div. 24.

(p) *Ashworth v. Outram*, 9 Ch. Div. 483.

(q) *Hastie v. Hastie*, 1 Ch. Div. 562; *Dicks v. Brooks*, 13 Ch. Div. 652.

deposition taken before an examiner or commissioner (lviii. 5).

Secondly, When appeal is to the House of Lords, the evidence is contained in the printed appendices scheduled to the petition of appeal.

§ 135. *Appeals.—Stay of Proceedings Pending.*—An appeal from a Master's decision operates no stay of proceedings unless and so far as the Master (or a judge) otherwise orders (liv. 5). An appeal from a District Registrar's decision operates no stay of proceedings unless and so far as the District Registrar (or a judge) otherwise orders (xxxv. 8). An appeal to the Court of Appeal operates no stay of execution or of proceedings under the decision appealed from (lviii. 16), all intermediate acts and proceedings holding good, unless otherwise ordered by the Court of Appeal (r), or by the court appealed from or any judge thereof (lviii. 16); the application to stay is to be first made in the court appealed from (lviii. 17) (s). But an order to show cause (upon a motion *ex parte* for a new trial) operates a stay of proceedings in the action, unless (and excepting so far as) the court upon granting the rule shall otherwise order (xxxix. 5).

## SECTIONS 136, 137.

### TIME—PROVISIONS REGARDING, *GENERAL* AND *PARTICULAR.*

§ 136. *Time — General Provisions Regarding.* — Month means calendar month, unless expressed to be lunar month (lvii. 2). Sunday, Christmas Day, and Good Friday are not reckoned when the time limited

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(r) *Adair v. Young*, 11 Ch. Div. 136.

(s) *The Khedive*, 5 P. D. 1; *Otto v. Lindford*, 18 Ch. Div. 394; and *disting. Wilson v. Church*, 11 Ch. Div. 576.

for doing any act or taking any proceeding is less than six days (lvii. 2); but Sundays, Christmas Day, and Good Friday are reckoned when the time limited is six days or more,—excepting to this extent, viz., if the time limited expires with a Sunday, then the act or proceeding may be done or taken on the Monday (lvii. 3), or if the time limited expires with a day on which the offices of the court are closed,\* then the act or proceeding may be done or taken on the day that the offices are next open (lvii. 3). And in particular, as regards the Long Vacation, being from 10th August to 24th October (both days inclusive) (lxi. 2, 3), it is not reckoned (unless the court specially orders to the contrary) in counting the time within which pleadings are to be filed, amended, or delivered (lvii. 5); and in fact, no pleading is to be (unless the court specially orders it to be) either amended or delivered during the Long Vacation (lvii. 4) (t). The court or a judge has a general power of enlarging or abridging the time appointed by the rules for the doing any act or the taking any proceeding (lvii. 6), and usually upon terms.

The division of the legal year into terms is abolished (Act 1873, § 26); but where the old terms were used as a measure for determining the time at or within which any act was to be done, they continue to be so used, unless and until they are superseded, and so far as they are not superseded by other provisions in the like behalf (Act 1873, § 26) (u).

### § 137. *Time.—Particular Provisions Regarding.—*

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\* The offices of the court are closed on Sundays, Good Friday, Easter Monday, Easter Tuesday, Whit Monday, Christmas Day, the working day next following Christmas Day, and all days specially appointed by royal proclamation as days of general fasting, humiliation, or thanksgiving (lxi. 4).

(t) *Chapman v. Real Property Trust, Limited*, 7 Ch. Div. 732.

(u) *College of Christ v. Martin*, 3 Q. B. D. 16; *Smith v. Parkside Mining Co.*, 6 Q. B. D. 67.



I. The regular or formal and usual stages.

*Writ of Summons.*—Good for one year only, unless renewed; and if renewed, then for six months at a time (viii. 1). Service of writ, at any time while current, is good.

*Appearance of Defendant to Writ.*—Normal period eight days after service of writ, or other the time specified in the writ; but any time before judgment will do.

*Plaintiff's Statement of Claim.*—Delivery of, to be within six weeks after defendant's appearance to writ (xxi. 1).

*Defendant's Statement of Defence* (with or without counter-claim).—Delivery of, to be within eight days after delivery of plaintiff's statement of claim (xxii. 1); and where no statement of claim delivered by plaintiff because defendant has stated that he does not require one, then within eight days after normal period for defendant's appearance to writ (xxii. 2).

*N.B.*—If defence is by *Demurrer*, the time is the same (xxviii. 3).

*Plaintiff's Reply.*—Delivery of, to be within three weeks after delivery of defendant's statement of defence (xxiv. 1).

*N.B.*—If reply is by *Demurrer*, the time is the same (xxviii. 3).

*Defendant's (or Plaintiff's) Pleading subsequent to Reply.*—Delivery of, to be within four days (normal period) after delivery of last preceding pleading (xxiv. 3).

*N.B.*—If any pleading subsequent to reply is by *Demurrer*, the time is the same (xxviii. 3).

*Demurrer, Entry for Argument.*—Within ten days after delivery (xxviii. 6), otherwise demurrer is good.

*Evidence by Affidavit.*—(Where evidence so taken by consent.) Delivery of plaintiff's affidavits, within fourteen days after consent (xxxviii. 1); delivery of defendant's affidavits, within fourteen days after delivery of plaintiff's (xxxviii. 2); delivery of plaintiff's affidavits in reply, within seven days after delivery of defendant's (xxxviii. 3).

*N.B.*—These times may be (and in general should be) specially agreed upon in the written consent to take the evidence by affidavit, or the court may be asked to extend same (xxxviii. 1, 2).

*N.B.*—If the evidence is to be taken *vivâ voce* at the hearing or trial, then each party prepares his own proofs in time for the hearing or trial simply.

*Cross-Examination on Affidavits.*—Notice for, delivery of, to be within fourteen days after delivery of plaintiff's affidavits in reply (xxxviii. 4); but the court may specially appoint any other time (xxxviii. 4). On trial of action or at hearing.

*N.B.*—If the evidence in chief is taken *vivâ voce* at the trial, then the cross-examination (if any) follows immediately upon the examination in chief, and then the re-examination (if any follows) upon such cross-examination immediately.

*Notice of Trial.*—Delivery of, by plaintiff with his reply (being a simple joinder of issue), or within six weeks after delivery of such a reply (xxxvi. 4); and after the expiration of such six weeks, either plaintiff or defendant may give the notice at any time, whichever of them is first in so doing (xxxvi. 4).

*Motion for Judgment.*—Action to be set down on, at any time within one year from the time at which the right to set down arose (xl. 9), but usually within ten

days from such time (xl. 3, 7); and the ten days' limit is the extreme limit when leave to move reserved at trial (xl. 2).

*Judgment, Entry of.*—As soon as the successful party is ready, and (where judgment is conditional) upon the condition being fulfilled (xli. 4, 5). The judgment when pronounced by or in court bears date the day it is so pronounced (xli. 2).

*New Trial, Motion for.*—*Ex parte* applications for order or rule *nisi* to be made,—

(a.) Where trial has been in London or Middlesex, within *four* days after trial, or on first day of next subsequent sitting of Divisional Court to hear motions (xxxix. 1a, March 1879).

(b.) Where trial has been elsewhere than in London or Middlesex, within first four days of next subsequent sittings, or within *seven* days after the last day of sitting on the circuits during which the action shall have been tried, if such day occurs during or within a week immediately before a vacation (xxxix. 1a, March 1879).

*N.B.*—Rule or order to show cause obtained on this motion is to be served within four days from its date (xxxix. 2); and cause is to be shown within eight days after date of rule or order (xxxix. 1a).

*Appeal.*—From Master at Chambers to judge at Chambers, four days (v).

*Appeal.*—From judge at Chambers to court, twenty-one days in Chancery (lviii. 15) (w); and eight

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(v) *Gibbons v. L. F. Association*, 4 C. P. Div. 263.

(w) *Dickson v. Harrison*, 9 Ch. Div. 243.

days in Common Law Divisions (liv. 6, March 1879) (x).

*Appeal, Notice of Motion for.*—Delivery of, at any time within one year, whether judgment is final or is interlocutory, to be computed (where judgment is refused) from date of refusal, and (where judgment is given for plaintiff or applicant) from the date the judgment is drawn up and entered (lviii. 15) (y). The appeal-notice must be a fourteen days' notice (lviii. 4), and notice (if any) of cross appeal an eight days' notice (lviii. 7). To Court of Appeal.

*Appeal, Petition of.*—Must be lodged in the Parliament office for presentation to the House of Lords within one year from the date of the judgment or order appealed from (App. Jur. Act, 1876, S. O., i.); and the appeal case (or cases), together with the appendices thereto, must be lodged in the same office within six weeks (in the case of English appeals) and eight weeks (in the case of Scotch and Irish appeals), from date of presentation of appeal (S. O., v.) But as regards appeals to the House of Lords, the year for appealing is reckoned (in cases of disability) from the time of attaining full age (in the case of infants), from the time of becoming discovert (in the case of married women), from the time of becoming *compos mentis* (in the case of *non compos mentis*), and from getting out from prison (in the case of persons in prison), and from returning from abroad (in the case of persons abroad), excepting that in the case of persons abroad, no further time than *five* years in all is to be allowed for appealing (S. O., i.) To House of Lords.

#### *Writ of Summons.*

(a.) *Concurrent Writ.*—May issue within twelve months from issue of original writ (vi. 1).

II. The incidental or summary and occasional stages.

(x) *Stirling v. Du Barry*, 5 Q. B. D. 65.

(y) *Lee v. Nuttall*, 12 Ch. Div. 61.

(b.) *Renewed Writ.*—Writ may be *renewed* for six months successively, each renewal to be made while original writ (either itself or as previously renewed) is current (viii. 1).

(c.) *Amendment of.*—With leave, at any time, and in any respect or respects (iii. 2 ; xxvii. 11).

(d.) *Amended Writ, Issue and Service of.*—Like original writ (xvi. 15).

*Appearance of Defendant to Amended Writ.*—Where party added as Defendant.—Normal period eight days after service of amended writ, or other the time specified in the amended writ (xvi. 13); but any time before judgment will do.

*Plaintiff's Statement of Claim.*

(a.) *Extension of Time to Deliver.*—The normal period of six weeks for delivery of statement of claim may be extended (xxi. 1).

(b.) *Amendment of.*—The statement may be *amended* once without leave at any time within three weeks after delivery of defendant's statement of defence, plaintiff not having meanwhile replied thereto (xxvii. 2), and (when no statement of defence has been delivered, then) within four weeks after appearance of last appearing defendant (xxvii. 2); and at any later time with leave (xxvii. 7).

*N.B.*—Amendments under special leave to amend must be made within the time specified in the order giving leave, or else within fourteen days from date of order (xxvii. 7).

(c.) *Delivery of Amended Statement of Claim.*—Where amendment made, the amended statement of claim must be delivered to persons already parties within the time for amending same (xxvii. 10), and to persons made for the first time parties by the amendment

within four days after the appearance of such parties (xvi. 16) to the amended writ of summons as served upon them (xvi. 16).

(d.) *Re-Amendment of.*—Re-amendments are clearly permitted with leave, and no time limited for making them, otherwise than by the order giving leave (xxvii. 5, 6).

(e.) *Amendments, Disallowance of.*—Applications to disallow amendments made without leave must be made within eight days after delivery of the amended statement of claim (xxvii. 4).

*Defendant's Statement of Defence, with or without Counter-claim.*

(a.) *Extension of Time to Deliver.*—The normal period of eight days for delivery of statement of defence may be extended (xxii. 1).

(b.) *Amendment of.*

(1.) If simple defence (without counter-claim), amend same with leave at any time, and without leave not at all (xxvii. 5, 6).

(2.) If defence with counter-claim, amend counter-claim once without leave at any time within four days after delivery of plaintiff's reply, defendant not having meanwhile pleaded to such reply (xxvii. 3), and (where no reply has been delivered, then) within twenty-eight days from delivery of defence (xxvii. 3); and at any later time with leave (xxvii. 1).

*N.B.*—Amendments under special leave to amend must be made within the time specified in the order giving leave, or else within fourteen days from date of order (xxvii. 7).

(c.) *Delivery of Amended Statement of Defence.*—Where

amendment made, the amended statement of defence must be delivered to persons already parties within the time for amending same (xxvii. 10); and to persons who by the amendment are made for the first time parties, within, *semble*, the like time.

- (d.) *Re-Amendment of*.—Re-amendments are clearly permitted with leave, and no time limited for making them, otherwise than by the order giving leave (xxvii. 5, 6).
- (e.) *Amendments, Disallowance of*.—Applications to disallow amendments made without leave must be made within eight days after delivery of the amended statement of defence and counter-claim (xxvii. 4).

*Plaintiff's Reply.*

(a.) *Extension of Time to Deliver*.—The normal period of three weeks for delivery of reply may be extended (xxii. 1).

(b.) *Amendment of*.—Amend same with leave at any time, and without leave not at all (xxvii. 5, 6).

*N.B.*—Amendments under special leave to amend must be made within the time specified in the order giving leave, or else within fourteen days from date of order (xxvii. 7).

(c.) *Delivery of Amended Reply*.—Where amendment made, the amended reply must be delivered within the time for amending same (xxvii. 10).

(d.) *Re-Amendment of*.—Re-amendments are clearly permitted with leave, and no time limited for making them, otherwise than by the order giving leave (xxvii. 5, 6).

*Third Party's Reply (being his Defence) to Counter-claim*.—Must be delivered within eight days (extend-

ible) after third party has been served with counter-claim (xxii. 8); but, no doubt, this reply will be allowed the same indulgences by way of extension of time to deliver, and by way of amendment and re-amendment of, as the defendant's statement of defence is allowed to have, as explained *supra*.

*Defendant's Further Defence.*—Of matter arisen since delivery of statement of defence, or of amended statement of defence,—by leave only, and to be delivered within eight days after the matter arisen (xx. 2).

*N.B.*—Matter arisen subsequent to writ issued may, without leave, be included in statement of defence (xx. 2).

*N.B.*—In either case, plaintiff may deliver a confession of the further defence or defence, and sign judgment for his costs up to the time of the delivery of such further defence or defence (xx. 3).

*Plaintiff's Further Reply.*—Of matter arisen since delivery of reply,—by leave only, and to be delivered within eight days after matter arisen (xx. 2).

*N.B.*—Matter arisen subsequent to delivery of statement of defence may, without leave, be included in reply (xx. 2).

*Third Party's Further Reply (being his Further Defence) to Counter-claim* *semble, like Defendant's Further Defence, supra.*

*Pleadings Subsequent to Reply.*—And which (being other than a simple joinder of issue) are by leave only (xxiv. 2), to be delivered within four days after the delivery of the previous pleading (xxiv. 3).



(a.) *Extension of Time to Deliver.*—But the normal period of four days may be extended (xxiv. 3).

(b.) *Amendment of.*—Amend same with leave at any time, and without leave not at all (xxvii. 6).

*N.B.*—Amendments made under special leave to amend must be made within the time specified in the order giving leave, or else within fourteen days from date of order (xxvii. 7).

(c.) *Delivery of.*—Where amendment made, the amended pleading must be delivered within the time for amending same (xxvii. 10).

(d.) *Re-Amendment of.*—Re-amendments are clearly permitted with leave, and no time limited for making them, otherwise than by the order giving leave (xxvii. 6).

*Summonses.*—Usually two clear days' service of, but shorter by leave.

*Notices of Motion for Interlocutory Order.*—Usually two clear days' service of, but shorter by leave (liii. 4).

*Appeals from Interlocutory Orders.*—The notice of appeal must be a four days' notice (lviii. 4), and must be given within twenty-one days from the order appealed from,—reckoning (in case of refusal of order) from date of refusal (2) or (in case of grant of order) from entry thereof (lviii. 15); but the twenty-one days within which an appeal from a County Court to the Chief Judge in Bankruptcy is allowed are to be reckoned from the date of the order being pronounced (a). Any cross appeal notice is a two days' notice (lviii. 7).

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(2) *In re Clagett, Fordham v. Clagett*, 20 Ch. Div. 134.

(a) *Ex parte Whitton, in re Greaves*, 13 Ch. Div. 881, following *Ex parte Hookey*, 4 D. F. & J. 456.

*Nota Bene.*—That an order overruling (or allowing) a demurrer, although it is not an interlocutory order, is to be appealed as if it were an interlocutory order (*b*), that is to say, it comes on amongst appeal motions (as distinguished from appeals), but the time for appealing is not twenty-one days, but a year, as in the case of a judgment.

*Appeals from Refusal of Interlocutory Orders ex parte.*—Must be brought within four days (lviii. 10).

*Appeal from District Registrar.*—Must be brought within four days (liv. 4).

*Appeal from Chambers to Judge.*—None in Chancery, but an immediate reference to judge in chambers; and in Common Law take out summons and make same returnable before the judge within four days from Master's decision (liv. 4) (*c*).

*Appeal from Judge at Chambers to Court.*—Twenty-one days (lviii. 15) (*d*) in Chancery actions; and in Common Law Divisions, eight days (liv. 6, March 1879) (*e*).

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(*b*) *Trowell v. Shenton*, 8 Ch. Div. 318.

(*c*) *Bell v. North Staffordshire Railway Co.*, 4 Q. B. D. 205.

(*d*) *Dickson v. Harrison*, 9 Ch. Div. 243.

(*e*) *Stirling v. Du Barry*, 5 Q. B. D. 65.

## § 138. TABULAR STATEMENT (IN ROUGH)

*(Designed principally to show the Varying Course which the Action*

1. THE WRIT.—PREPARATION, ISSUE, AND SERVICE OF.
2. THE APPEARANCE.—ENTRY OF.
3. PLAINTIFF'S STATEMENT OF CLAIM.—PREPARATION AND DELIVERY OF.
4. DEFENDANT'S STATEMENT OF DEFENCE.—PREPARATION AND DELIVERY OF.  
(in any of the following forms):—

(a.) DEMURRER—  
In which case, the  
steps (subsequent  
to delivery of) are  
as follows:—

5. Entry of Demur-  
rer for Argu-  
ment, and notice  
of such entry to  
other side.

6. Argument of De-  
murrer.

9. Judgment on De-  
murrer,—*when*, if  
overruled, subse-  
quent defence is  
by defence pro-  
perly so called  
(*c. infra*); but if  
allowed, and no  
liberty to amend,  
then,—

8. Satisfaction of  
costs, for recovery  
of which—

9. Entry of Judg-  
ment.

10. Execution.

Either (aa.)

5. Demurrer by  
Plaintiff,—in  
which case, the  
steps (subsequent  
to delivery of) are  
as follows:—

6. Entry.

7. Argument.

8. Judgment.

9. Satisfaction of  
costs.

10. Entry of Judg-  
ment for costs.

11. Execution.

[Exactly as in De-  
murrer (a, *supra*).]

(b.) PLEA—  
In which case, the  
steps (subsequent  
to delivery of) are  
as follows:—

Or (bb.)

5. Reply of Plain-  
tiff,—in which  
case, the steps  
(subsequent to  
delivery of) are  
as follows:—

6. Notice of Trial  
of Plea.

7. Entry of Action  
(Plea) for Trial.

8. Trial.

9. Verdict,—*when*,  
if verdict is

For plaintiff;

10. Judgment.

11. Entry of Judg-  
ment.

12. Execution.

but if for defendant,

10. Satisfaction of  
costs, for recovery  
of which,—

11. Entry of Judg-  
ment.

12. Execution.

## OF PROCEEDINGS IN AN ACTION.

*may pursue Subsequently to Delivery of Plaintiff's Statement of Claim.)*

(c.) DEFENCE PROPERLY  
so called.

Either (aa.) Without *Counter-claim*,—in which case, the steps (subsequent to delivery of) are as follows:—

- Either (A.)
- 5. Demurrer by Plaintiff—  
in which case, the steps (subsequent to delivery of) are as follows:—
- 6. Entry.
- 7. Argument.
- 8. Judgment.
- 9. Satisfaction of Costs.
- 10. Entry of Judgment for Costs.
- 11. Execution.
- [Exactly as in Demurrer (a, *supra*).]

- Or (B.)
- 5. Reply of Plaintiff,—  
in which case, the steps (subsequent to delivery of) are as follows:—

Or (bb.) With *Counter-claim*,—in which case, the steps (subsequent to delivery of) are as follows:—

- Both (A.)
- 5. Reply of Plaintiff (or of *New Third Party*) to Defence,—and then (as to this) exactly as in (aa.) A, *supra*, if by demurrer; or as in (aa.) B, *supra*, if not by demurrer.
- And (B.)
- 5. Reply of Plaintiff (or of *New Third Party*) to counter-claim,—and then (as to this) exactly as in (aa.) A, if by demurrer to counter-claim, or as in (aa.) B, *supra*, if not by demurrer to counter-claim.

Either (A.) where Reply is Simple Joinder of Issue.

- 6. Notice of Trial of Action.
- 7. Entry of Action for Trial.
- 8. Trial.
- 9. Verdict,—  
*when*,—  
if verdict is

For plaintiff; but if for defendant,—

- 10. Judgment.
- 11. Entry of Judgment.
- 12. Execution.
- 10. Satisfaction of Costs, for recovery of which,—
- 11. Entry of Judgment.
- 12. Execution.

Or (B.) where Reply is not Simple Joinder of Issue.

Either (AA.)

6. Defendant's Joinder of Issue simply, in which case the steps (subsequent to delivery of) are as follows:—  
[Exactly as in A, *supra*.]

Or (BB.)

6. Defendant's subsequent pleading other than a Joinder of Issue simply, and which pleading can only be pleaded by *leave*, and what the subsequent steps would be would depend upon pleading, for which such leave given.



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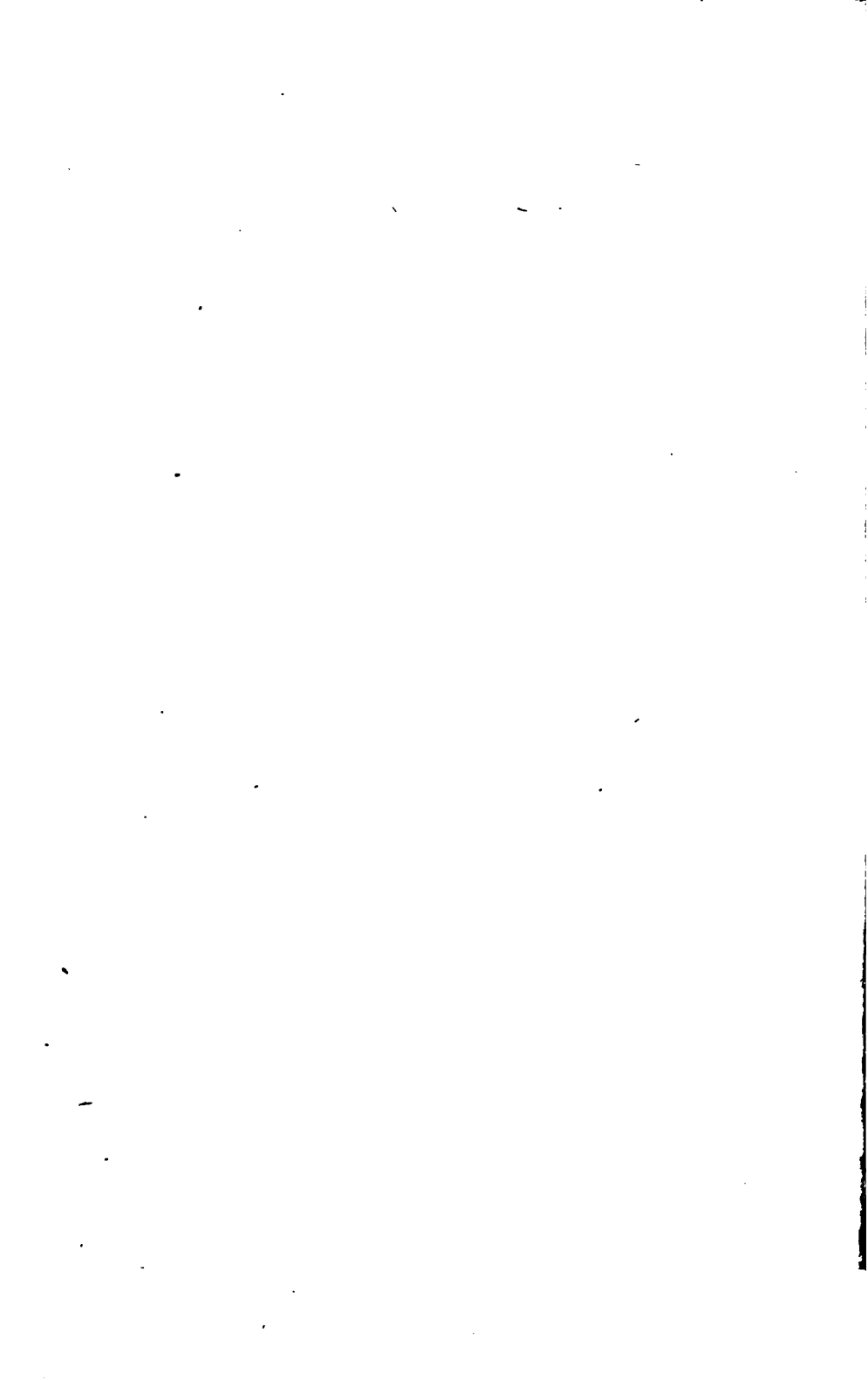
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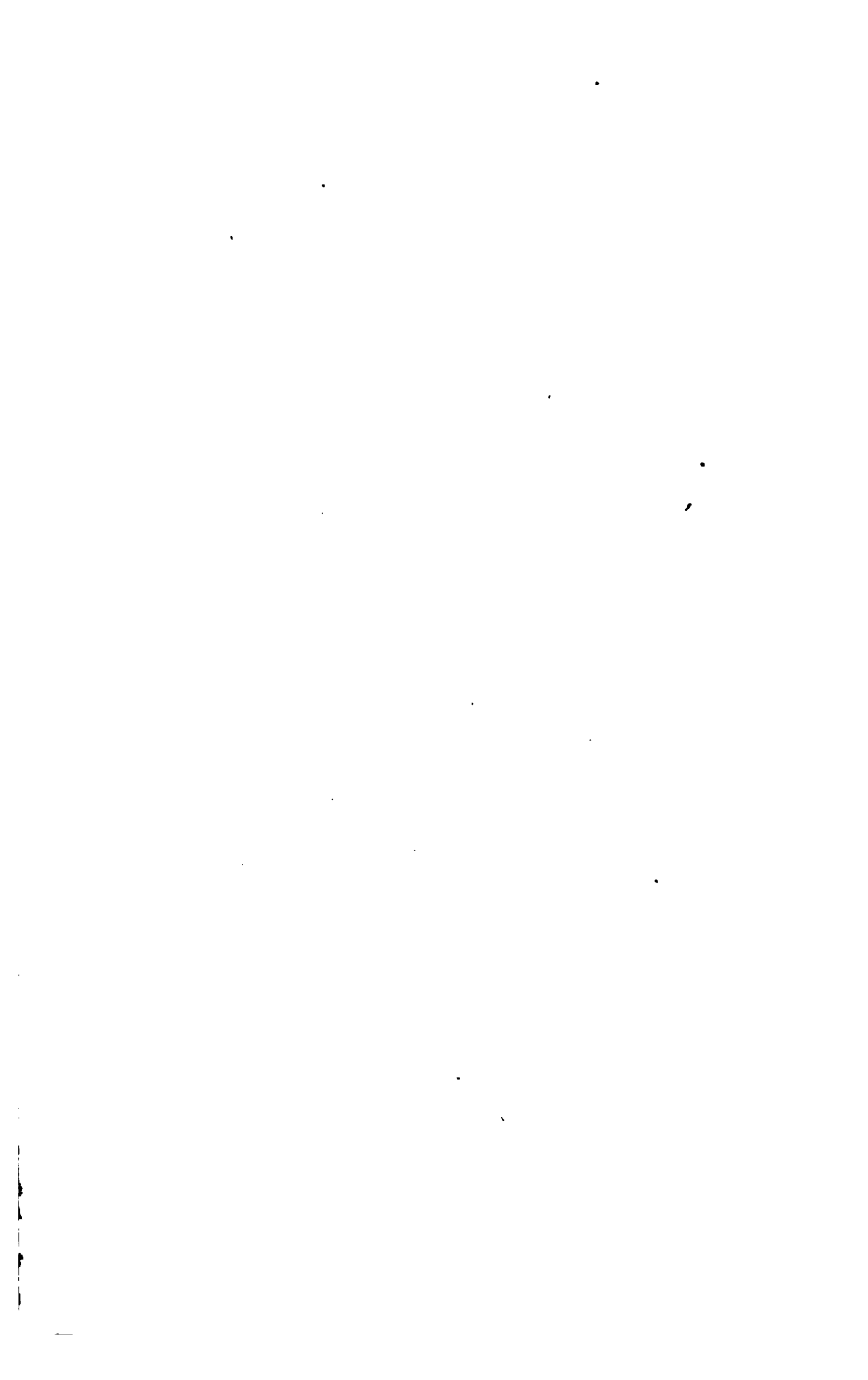
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